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No. 85-1292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

M.C.C. OF FLORIDA, INC.
and
MICHAEL CONSTRUCTION COMPANY,
Petitioners
v.
UNITED STATES OF AMERICA
and
STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL REGULATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Seventh Amendment afford trial by jury when the United States and a state agency sue for money damages, statutory penalties and equitable relief, and the defendant contests the material issues of fact and law?

2. Has the mariner's traditional right to use the bottom of a navigable waterway been revoked by the Rivers and Harbors Act or the Clean Water Act?

PARTIES TO THE PROCEEDING

Petitioner M.C.C. of Florida, Inc., a defendant-appellant below, has been merged into its parent, Michael Construction Company, which is a subsidiary of Michael Investment Corporation, a Tennessee corporation. Petitioner Michael Construction Company, also a defendant-appellant below, is an affiliate of Biloxi Prestress Concrete, Inc., a Mississippi corporation.

The plaintiff below was the United States, and the intervening plaintiff was the Department of Environmental Regulation of the State of Florida. Both were appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 7, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 1501 and is reproduced at App. 1a. The pertinent rulings, findings and judgment of the District Court are not reported and are reproduced at App. 14a-43a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1985. A timely petition for hearing and suggestion for rehearing en banc was denied by order entered November 13, 1985. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

A. *As to the right to jury trial.*

Amendment VII to the Constitution of the United States provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Rule 38, Federal Rules of Civil Procedure, provides:

> Rule 38. Jury Trial of Right
>
> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.[1]

The Rivers and Harbors Act, 33 U.S.C. §§ 403 *et seq.* (App. 46), and the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.* (App. 47a), are silent as to the right of jury trial.

Similar Florida statutes and regulations, reproduced at App. 50a-55a, are likewise silent as to the right of jury trial.

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[1] The enabling act for the Federal Rules of Civil Procedure, which directed the preservation of the constitutional right of jury trial, was Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. former § 2072, formerly § 723c.

B. *As to the right of mariners to use the bottom of a navigable waterway.*

The respondent government agencies and the courts below took the view that the following statutes and regulations prohibited petitioners' vessels from using soft bottom as part of the navigable waters.

1. *Rivers and Harbors Act.*

33 U.S.C. § 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same. (Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151.)

33 U.S.C. § 406. *Penalty for wrongful construction of bridges, piers, etc.; removal of structures.*

Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [33 U.S.C. §§ 401, 403, and 404], or any rule or regulation made by the Secretary

of War [Secretary of the Army] in pursuance of the provisions of said sections eleven [33 U.S.C. § 404], shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. (Mar. 3, 1899, ch. 425, § 12, 30 Stat. 1151; Feb. 20, 1900, ch. 23, § 2, 31 Stat. 32.)[2]

2. *Clean Water Act.*

33 U.S.C. § 1311. *Effluent Limitations.*

(a) *Illegality of pollutant discharges except in compliance with law.* Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(b) *Civil actions.*

The administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under section (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the com-

[2] Although the proceeding was a civil action, the courts below imposed a $20,000 penalty under this misdemeanor provision and under 33 U.S.C. § 1319(d) (civil penalty of up to $10,000 per day).

mencement of such action shall be given immediately to the appropriate State.[3]

* * * *

33 U.S.C. § 1319(d) *Civil Penalties.*

Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 U.S.C. § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 U.S.C. § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. § 1344. *Permits for dredged or fill material.*

(a) *Discharge into navigable waters at specified disposal sites.* The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

3. *Corps of Engineers Regulations.*

(k) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(l) The term "discharge of dredged material" means any addition of dredged material into waters of the

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[3] The action in this case was not brought by the Administrator of the EPA; it was brought by the Corps of Engineers.

United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products.

(m) The term "fill material" means any material used for the primary purpose of replacing the aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure of impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees, fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include

plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. §§ 323.2(k), (l), (m), (n).

Similar Florida statutes and regulations relied on by the intervening state agency to interdict petitioners' navigation rights are produced at App. 50a-55a.

STATEMENT OF THE CASE

Two far-reaching questions are presented in this case: (1) whether a defendant is entitled to a jury trial when sued by federal and state agencies for damages, penalties and equitable relief; and (2) whether the Rivers and Harbors Act or the Clean Water Act has abolished the ancient doctrine that soft bottom is a part of the draft of navigable waters, available to mariners for any maritime purpose.

In October 1981, agents of the Corps of Engineers stopped and boarded petitioners' vessel as it was proceeding through Niles Channel, a navigable waterway in the Florida Keys which connects the Gulf of Mexico and the Atlantic Ocean. The agents served on the captain a cease and desist order which charged that petitioners were dredging and filling without a permit. The vessel was not dredging or filling in any ordinary sense, but was engaged in transporting barges. The Corps asserted, however, that the revolutions of the vessel's propellers were disturbing the bottom of the waterway and the turtle grass which grew on the bottom. This disturbance, the Corps said, was "prop dredging" in violation of the Clean Water Act, which prohibits the discharge of dredged or fill material into waters of the United States, unless the work has been authorized by a permit. District Court Transcript ("Tr.") Vol. 6, pp. 197-198; Vol. 5, pp. 208-211.

Petitioners, when served with the cease and desist order, were beginning to transport bridge segments to a

federal aid highway bridge over Niles Channel. Public agencies, including the Coast Guard, had determined that it was desirable to build a high rise bridge over the channel in order to make the waterway there more accessible to maritime traffic. The pre-manufactured components of such a bridge, designed by the Florida Department of Transportation ("Florida DOT") and approved by the Federal Highway Administration, could only be gotten to the site by tugs and barges.

The Corps of Engineers, at the local level, had not known of the decision to make Niles Channel a new navigational crossing until after work had begun on the bridge.[4] The local Corps representatives and representatives of the Florida Department of Environmental Regulation ("Florida DER") opposed the concept of inviting larger vessels through Niles Channel.[5] Their concern was that beds of turtle grass, *Thalassia Testudinum*, would be "prop scarred" and disrupted by the propellers of vessels having a draft greater than two feet or so.[6] They

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[4] The Corps of Engineers by administrative agreement had relinquished its bridge design oversight to the Coast Guard, which requested the Florida DOT to erect a high rise bridge at Niles Channel.

[5] Formerly, sizeable vessels could enter Niles Channel, but they could not transit from Gulf to Ocean or vice-versa because of the low and narrow arches of the old bridge carrying U.S. Highway 1. To make a crossing, larger vessels in the middle Lower Keys had to travel eastwardly to Bahia Honda Channel or westwardly around Key West. For a typical 39 foot fishing vessel with 50" draft, based in the middle Lower Keys, the Niles Channel crossing would save up to a day in time and several hundred gallons of fuel on each outing.

[6] Certain areas of Niles Channel provided a depth above soft bottom of about four feet at low tide, five to five and a half feet at high tide, and the blades of the turtlegrass reached about two feet above the bottom. Turtle grass grows in shallow salt water throughout the South Florida and Keys area. The propellers of most boats, even outboards, cause some bottom disturbance when passing over or bumping soft bottom in the shallow waters of South Florida. There is no specific statute protecting turtle grass.

were immediately concerned that petitioners' tug boats would "prop scar" the soft bottom, and they were lying in wait with the cease and desist order when petitioners' tug first began transporting barges in the channel.

The Florida DOT, the Federal Highway Administration, and the Coast Guard wanted the work to proceed; the Corps of Engineers and the Florida DER wanted it halted; and local interest groups took varying positions. Petitioners, working under a contract completion deadline, attempted to satisfy the Corps and the Florida DER with certain accommodations but advised the Corps that they relied on their common law right of navigation and would continue to exercise it. The Corps of Engineers immediately caused a civil suit to be filed [7] alleging that petitioners were violating Section 403 of the Rivers and Harbors Act (excavating or filling an unauthorized work),[8] and Section 1311 of the Clean Water Act (discharging pollutants into waters of the United States).[9] The original complaint sought a restraining order, a permanent injunction, a restoration order, and civil penalties of $10,000 per day under 33 U.S.C. §§ 1311 and 1319(d). The restraining order and application for an injunction were denied. The intervening plaintiff, Florida DER, sought general damages, civil penalties of $10,000 per day under Florida statutes,[10] and a permanent injunction. After petitioners' oral and written mo-

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[7] The suit was not brought in admiralty, but in law. For jurisdiction, the Government relied on 28 U.S.C. § 1345 and claimed under the following statutes: 33 U.S.C. § 403; 33 U.S.C. § 1311 and 33 U.S.C. § 1319.

[8] Record Excerpts in the Court of Appeals ("Record Excerpts"), pp. 9-10.

[9] Record Excerpts, pp. 9-10.

[10] F.S.A. § 403.161(1)(a) (causing pollution); F.S.A. § 403.161(1)(b) (dredging without a permit); F.S.A. § 403.141(1) ($10,000 per day civil penalty); F.S.A. § 403.141 (liability for general damages for violating § 403.161).

tions to dismiss and for summary judgment were overruled, petitioners filed their answers to the original and intervening complaints, denying the legal and factual bases asserted and demanding trial by jury.

Florida DER filed a written motion to strike petitioners' jury demand,[11] and the trial court granted the motion over petitioners' objection.[12] At the beginning of the liability phase of the trial, the United States filed a written motion to strike petitioners' jury demand,[13] and the trial court granted the Government's motion over objection.[14]

Numerous questions of fact and of mixed law and fact were strongly contested in the liability phase of the trial, which occupied five days. Questions disputed included the amount of navigation previously occurring in the channel; the extent of pre-existing "prop scarring"; the amount of "prop scarring" done by petitioners' vessels, as opposed to other vessels; the motives or good faith of the plaintiffs' representatives; the credibility of witnesses; the permanence of the bottom disturbance; the purpose and effect of the new bridge; and the application of the statutes relied on to the facts proved. In his findings of fact and conclusions of law, the trial judge found substantially all of the many fact, mixed and legal issues strongly in favor of the Government and against petitioners.

Following the second or "damage" hearing,[15] which occupied four days and also featured issues of fact, credibility and reasonableness, the trial court awarded damages of $200,000 and a penalty of $20,000 against peti-

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[11] Record Excerpts, p. 51.

[12] Record Excerpts, p. 58.

[13] Record Excerpts, p. 65.

[14] Record Excerpts, pp. 68-76; *see also* App. 2a, 10a.

[15] By this time, the new bridge had been completed.

tioners for displacing bottom sediments. He ordered the Government to file a plan for using the money in a seagrass mitigation project in South Florida. Petitioners appealed, urging, *inter alia*, that bottom roiling by propeller action was not within the statutory concepts of dredging, filling or discharging pollutants, that the right to use the bottom was a part of the dominant right in navigation, and that the Seventh Amendment afforded the right to a jury trial upon the factual and legal issues.

The Eleventh Circuit, in an opinion authored by District Judge Hoffman, affirmed the trial court except as to the mechanics of the submission and approval of a plan on which to expand the $220,000. According to the appeals court, the displacement of soft bottom by propeller action in the course of navigation is an unauthorized dredge and fill work prohibited by 33 U.S.C. § 403. Such displacement, said the court, is also the "addition of a pollutant" to the waters of the United States, in violation of 33 U.S.C. §§ 1252 *et seq.* The appeals court did not address the proposition that the right to use navigable waters includes the right to use the bottom.

Upon the question of a jury trial, the Court of Appeals said that the issues under the Rivers and Harbors Act and the Clean Water Act were equitable in nature; therefore, there was no right to a jury trial. The court relied in part on the Fourth Circuit's opinion in *United States* v. *Tull*, 769 F.2d 182 (1985), from which certiorari is being sought in this Court (No. 85-1259). The effect of the state agency's claim for general damages in the consolidated lawsuit was not mentioned in the appellate court's opinion.

REASONS FOR GRANTING THE WRIT

1. *Right to trial by jury.*

The Rivers and Harbors Act and the Clean Water Act contain no provision against trial by jury. There was no technical sort of administrative proceeding or hearing in this case; the Government and the Florida DER sim-

ply filed lawsuits against petitioners seeking to have them enjoined, fined civilly, and held for damages. The Corps of Engineers was concededly stretching statutes never before so applied in the interest of saving bottom growth which had no statutory protection. The testimony of the Government representatives contained some discrepancies, and a great deal of their testimony was contested by petitioners' witnesses, including representatives of other Government agencies. Thus, there were classic issues of fact and credibility. To a large degree, if the case were not decided on a point of law, its resolution involved a value judgment of primary interest to local citizens: whether increased navigation or unscarred bottom was the higher good.

At the same time, petitioners were facing possible ruin. To build the bridge, their tugs had to operate in Niles Channel for more than six months. The plaintiffs were seeking civil statutory penalties of up to $10,000 a day for every day of operation, in addition to general damages. Petitioners believed that their positions would likely be sustained by a Key West jury, some of whom would be mariners, all of whom would be using the new highway bridge, and most of whom would know of the Corps' penchant for litigation and expanding jurisdictional claims.

Except as to the form of any mitigation or restoration order, the equitable aspects of the case were eliminated early when the temporary injunction applications were denied. The trial court concluded the case by awarding money damages and a money penalty.

In short, the suit was most similar to a damage suit at law, and there was no reason not to empanel a jury. Stripped of pretense, the suit was an action for trespass to the bed of the waters.

In 1909, this Court assumed and stated that a citizen sued by the government for a $1,000 penalty for violation of the immigration laws was entitled to have a jury em-

paneled. *Hepner* v. *United States*, 213 U.S. 103 (1909). In 1914, in *United States* v. *Regan*, 232 U.S. 37, 47 (1914), another civil penalty case, the Court stated that a jury trial was demandable in an action of debt involving more than twenty dollars. In 1977, in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), the Court held that the Seventh Amendment did not prohibit Congress from assigning hearing and fact-finding functions and penalty assessments to an administrative agency. However, the Court also noted that the cases had held "that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required" (*id.* at 460), and that "history and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the form in which it is to be resolved." *Id.* at 460-461.[16]

In non-government lawsuits, the Court has made it abundantly clear that a jury may be requested in civil actions based on federal statutes (*Curtis* v. *Loether*, 415 U.S. 189 (1974)), and that prayers for equitable relief do

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[16] Florida law would have provided a jury in this case had the state's claims been tried in state court. Article 1, § 22 of the Florida Constitution provides that "The right of trial by jury shall be secure to all, and remain inviolate forever." The right to a jury trial has been called "absolute," "organic" and "sacred" by the Florida Supreme Court. *State ex rel. Jennings* v. *Peacock*, 126 Fla. 743, 171 So. 821, 822 (1937). Florida has followed *Dairy Queen* in holding that a jury is to be provided in mixed legal and equitable cases. *Cerrito* v. *Kovitch*, 457 So.2d 1021 (Fla. 1984). The Florida Supreme Court has also held that a jury must be provided in new statutory causes of action where damages and an injunction are sought in equity. *Wiggins* v. *Williams*, 36 Fla. 637, 18 So. 859 (1896).

The Florida statutes sued on by the state agency specifically provide for alternative administrative or judicial remedies. F.S.A. § 403.121(1), (2) (App. 51a). Thus, Florida's choice to proceed judicially rather than administratively mandated a jury trial under the Florida authorities, in the same way as declared in *Atlas Roofing*.

not defeat the jury trial, if legal rights are also to be ascertained and determined. *Ross* v. *Bernard*, 396 U.S. 531 (1970); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). A claim for a money judgment is a legal claim (*Dairy Queen*); the awarding of compensatory and punitive damages is a traditional legal remedy (*Curtis* v. *Loether*); and there is a strong federal policy favoring jury decisions on disputed fact questions. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Line, Ltd.*, 369 U.S. 355 (1962).

The aspects of this case which would classify it under prior holdings of the Court as being in part legal, and thus requiring a jury, were: (1) it was a lawsuit, filed on the law (as opposed to admiralty) side of the court; (2) it was not the culmination of an administrative agency proceeding; (3) it involved a determination of legal rights, *i.e.*, the right to navigate through Niles Channel; (4) it required resolution of many disputed issues of fact; (5) the complaint of the Florida DER sought general damages; (6) the complaint of each plaintiff sought statutory civil penalties; and (7) the issues were of public interest and were especially appropriate for decision by local citizens.

There is no modern holding of this Court indicating that a jury should not be empaneled in such a case. It may fairly be asserted that the lesson from the holdings is that a jury is required whenever there may be doubt.[17] Juries have previously been afforded when Government agencies have sought penalties,[18] and the intermixing of

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[17] *See* J. Moore, *Moore's Federal Practice*, para. 38.31[1] (2d ed. 1976); C. Wright and A. Miller, *Federal Practice and Procedure*, §§ 2302, 2306, 2308, 2316 (1971).

[18] *United States* v. *Regan*, 232 U.S. at 47; *Hepner* v. *United States*, 213 U.S. at 115; *FAA* v. *Landy*, 705 F.2d 624, 627, 635 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983); *United States* v. *J. B. Williams Co.*, 498 F.2d 464 (2d Cir. 1974).

claims for legal and equitable relief certainly does not defeat the jury right.[19]

The Court should declare that the jury trial pronouncements of *Regan*, *Hepner* and *Atlas Roofing* were not mistakes, and the Seventh Amendment should be applied as in the Second Circuit Court of Appeals. Judge Friendly for that court reasoned that "if in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later." *United States* v. *J. B. Williams Co.*, 498 F.2d at 424-425.

A citizen is in greater need of the protection of a jury when sued by the Government, with all its resources, than when sued by another citizen. As Congress expands the authority of agencies to seek civil penalties in the courts, the need for Seventh Amendment protection increases. Under the Clean Water Act alone, there are five separate civil penalty provisions,[20] ranging in amounts from $2,000 per violation (33 U.S.C. § 1322) to $50,000 per day (33 U.S.C. § 1415). But outside the Clean Water Act there are numerous other federal statutes, many passed in the 1970's and 1980's, authorizing the pursuit of civil penalties by action in the District Courts. The subject matter runs the gamut from Agriculture, Animals, Antitrust and Automobiles through Banking, Commerce, Consumer Product Safety, Conservation, Energy, Ethics, and so on, down through Shipping, Solid Waste Disposal, Tariffs, Toxic Substances and Tunas-Atlantic and Tunas-Pacific ($100,000 per violation). We estimate that over a hun-

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[19] *Dairy Queen, Inc.* v. *Wood, supra*; *Beacon Theatres, Inc.* v. *Westover, supra*; *United States* v. *Williams*, 441 F.2d 637 (5th Cir. 1971).

[20] 33 U.S.C. §§ 1319, 1321, 1322, 1344, 1415.

dred federal statutes enacted since 1972 have authorized the Government to seek civil penalties in the District Courts. Surely a jury is going to be demanded, and ought to be provided, in those cases arising under these statutes that have not been designated by Congress for administrative fact-finding. The Seventh Amendment is a protection against possible oppression and injustice when the most powerful litigant in the nation finds a favorable forum.

2. *Right of navigation.*

For centuries, it has been the law in Western Europe and in this country that vessels in navigable waters are entitled to use soft bottom in aid of navigation. In 1633, the word "dock" (Dutch *docke*) was used in English to mean "the bed (in the sand or ooze) in which a ship lies dry at low water." *The Oxford Universal Dictionary*, 1964.

> By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extended to high-water mark only. But by an ancient ordinance, usually denominated the ordinance of 1641, § 3, it is declared, "that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: Provided, that such proprietors shall not by this liberty have power to stop or hinder the passage of boats, or other vessels in or through any sea, creeks, or coves, to other men's houses or lands."

The City of Boston v. Lecraw, 58 U.S. 426, 432 (1854).

Thus, by the ordinance of 1641, which became part of the common law of some of our states, the bed of the water was yet reserved for navigation.

The dominant right of navigation in navigable waters of the United States has been recognized in many cases,

state and federal.[21] The right to use a navigable waterway includes the right to use the soft muds of the bottom.[22] A vessel forcing its way through soft mud is "navigating." *Western Union Tel. Co. v. Inman & I.S.S. Co.*, 59 F. at 367-368. In fact, a tug may plow through mud at high rpm's. *The Bart Tully*, 251 F. 856, 859 (6th Cir. 1918). Every inch of silt that can be utilized is needed and should be scrupulously preserved for the uses of navigation as against all unnecessary interference. *The City of Richmond, supra.*

By what authority, then, did the Corps of Engineers seek to prevent petitioners from navigating? The Corps claimed authority under the Rivers and Harbors Act, 33 U.S.C. § 403, and the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.*

The Rivers and Harbors Act of 1899 prohibits excavating or filling unless "the work" has been authorized. *See United States* v. *Republic Steel Corp.*, 362 U.S. 482

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[21] Among federal cases, *see United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82 (1913); *Orange Beach Water, Sewer and Fire Protection Authority* v. *M/V Alva*, 680 F.2d 1374 (11th Cir. 1982); *Rocky Point Oyster Co.* v. *Standard Oil Co.*, 265 F. 379 (D. R.I. 1920); *The Steam Dredge No. 6*, 222 F. 576 (D. N.Y. 1915), *aff'd sub nom. The No. 6*, 241 F. 69 (2d Cir. 1917); *The City of Richmond*, 43 F. 85 (D. N.Y. 1890), *aff'd sub nom. Western Union Tel. Co.* v. *Inman S.S. Co.*, 59 F. 365 (2d Cir. 1894). Exemplar state cases declaring the primacy of the right to navigation are *Porter* v. *Allen*, 8 Ind. 1, 65 Am. Dec. 750 (Ind. 1856) (whole of river a public highway); *Gunter* v. *Geary*, 1 Cal. 462 (1851) (all below low-water mark is public highway); *City of Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325 (Ala. 1839), *aff'd*, 41 U.S. 234 (1842) (navigable waters include all soil within high watermark); *City of Baltimore* v. *McKim*, 3 Bland 453 (Md. 1831); *Commonwealth* v. *Fisher*, 1 Pen. & W. 462 (Pa. 1830).

[22] *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs, supra*; *Orange Beach Water, Sewer and Fire Protection Authority* v. *M/V Alva, supra*; *Jones Towing Co., Inc.* v. *United States*, 277 F.Supp. 839 (D.C. La. 1967); *The City of Richmond, supra.*

(1960), where both the majority and dissenting opinions state that "the work," denoting a planned construction undertaking, refers to dredge and fill activities. *Id.* at 486-487; *see also id.* at 505 (Harlan, J., dissenting). It has never before been held that navigating through soft bottom is an unauthorized dredge and fill "work." The holdings below not only strain the 1899 statute beyond any conceivable thought of Congress; they abolish a solid body of important primal law—the right of mariners to use the bottom of navigable waterways—without the slightest mention of it.

Congress enacted the Rivers and Harbors Act not for the purpose of environmental protection but rather in order to enhance commerce by protecting navigation on the nation's waterways. Legislation was required because this Court had ruled in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888), that the common law did not prohibit obstruction in navigable waters. Hence, Congress passed the Rivers and Harbors Act for the specific purpose of preserving the navigability of United States waters. *E.g.*, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-709 (1899); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 718 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965) (the Act's "general purpose" is "insuring freedom of navigation"); *Potomac River Ass'n, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357-358 (D. Md. 1975) ("the original purpose of the Act was to protect navigation"); *Phenix Construction Co.* v. *Cornell S.S. Co.*, 210 N.Y. 113, 103 N.E. 891, 893 (N.Y. 1913), *aff'd*, 233 U.S. 593 (1914). In light of the well-defined legislative purpose behind the Act, the courts should be wary of assigning other purposes to the Congress—such as environmental protection—under this statute. *See Potomac River Association*, 402 F. Supp. at 358.[23]

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[23] Moreover, Congress has also plainly recognized that an important aspect of protecting the navigability of the nation's rivers

The holdings below empower the Corps of Engineers to halt shipping and boating, or individual vessels, wherever navigation results in bottom roiling or bottom contact. The notion that roiling the bottom is "dredging" stretches the ordinary meaning of the term beyond what Congress could possibly have intended. Under the evidence in this case, all but the smallest craft navigating in the waters of South Florida cause such disturbance. Surely so broad a power to interdict navigation, which is contrary to the law of the ages, ought not to be conferred except by explicit legislative action.

The Clean Water Act was passed in a more ecologically conscious time, yet again it contains nothing suggesting that the mere use of the bed of navigable waters is an unlawful "discharge" of a pollutant or the "addition of dredged material into" waters of the United States. Under all antecedent law, the soft bottom is itself a part of the waters; ergo, its fluid movement could not be an "addition to" or "discharge into" the waters. Nothing was emitted from the vessels in this case; nothing was taken from or added to the waters. As conceded by Government witnesses, all but the smallest skiffs and outboards will be violating the Clean Water Act as the boats' propellers stir up milky trails of sediment in the shallow waters of South Florida. Tr. Vol. 5, p. 75; Vol. 7, pp. 93-95, 107, 115-119.

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is the removal of snags and debris from river channels. *See* 33 U.S.C. §§ 603a-606 (provisions for removal of snags and debris from various waterways, including specifically the Mississippi and Ohio Rivers). Removal of snags and other obstructions is necessary not only to foster commercial use of the rivers but also to assure that the rivers may be used if needed for national defense or other emergency purposes. *See generally*, S. Rep. No. 722, 95th Cong., 2d Sess. 2 (1978) (legislative history of amendments aimed at encouraging private industry activity in dredging river bottoms). Here, in fact, the Coast Guard wanted the channel to be accessible to larger vessels so as to make available a safe harbor from Atlantic storms and to provide a crossing for patrol boats.

Lest it be thought that the Corps would indulge a judicious weighing process before ordering a halt to navigation, one need only look to this case. The bridge was a much-needed joint federal-state project, its high-rise design requested by the Coast Guard for the purpose of making Niles Channel a new navigational crossing between the Gulf and the Atlantic; yet after the project was under construction, the Corps sought to halt the navigation because it was dislodging turtle grass. Moreover, there are no standards for granting a permit and no procedures set up by which the various relevant factors can be weighed and judged. The holdings below grant to the Corps of Engineers a vast expansion of its power and jurisdiction, which may be arbitrarily exercised about the country according to the values of the local representative, to the detriment of water-borne commerce.

CONCLUSION

The Court should grant certiorari and expressly hold that a defendant is entitled to a jury when sued by the Government for damages, penalties and equitable relief upon contested facts. The Court should reaffirm that the navigable waters of this country, including the navigable bottoms, are forever free and open highways for all classes of vessels, until Congress or state legislatures expressly declare the contrary, and that neither the Rivers and Harbors Act nor the Clean Water Act inhibits vessels from passing over or through the soft bottom of navigable waters.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-5738

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

and

STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL REGULATIONS
[*sic*; REGULATION],
Plaintiff-Intervenor,

v.

M.C.C. OF FLORIDA, INC.,
MICHAEL'S [*sic*; MICHAEL] CONSTRUCTION COMPANY,
Defendants-Appellants,
Cross-Appellees.

Oct. 7, 1985

Appeals from the United States District Court
for the Southern District of Florida

Before HENDERSON and CLARK, Circuit Judges, and HOFFMAN,* District Judge.

HOFFMAN, District Judge:

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

The United States for the Corps of Engineers brought a civil action against M.C.C. of Florida, Inc. and Michael Construction Co.[1] for violating the River and Harbor Act [*sic* throughout opinion] of 1899, 33 U.S.C. § 401 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The State of Florida, Department of Environmental Regulation (DER) intervened as a plaintiff, charging that M.C.C. had violated similar Florida statutes, sections 403.161(1) and 403.031 Florida Statutes. The case was tried without a jury over the objection of M.C.C. The district court found for the plaintiffs and ordered M.C.C. to pay $200,000 to the court for use in restoration projects in South Florida and $20,000 in civil penalties. M.C.C. appeals this decision and the United States has cross-appealed on the issue of the appropriateness of the remedy.

In late December, 1980, the Florida Department of Transportation (DOT) awarded the contract to M.C.C. to build a replacement bridge over Niles Channel as part of its project to restore U.S. Highway 1. Niles Channel is a navigable waterway connecting the Bay of Florida with the Atlantic Ocean. The contract called for segmental construction which entails the making of large hallow concrete segments at M.C.C.'s casting yard at Conch Key. The segments were too large to be carried over land to the construction site and therefore had to be transported by barge.

The DOT, in 1975, had prepared an environmental impact study which called for a bridge with a 15 foot clearance, but stated that it may be raised. The contract made in 1980 called for a 40 foot clearance. A negative declaration was issued which meant that the project would not adversely affect the environment. DOT was responsible for obtaining all the necessary permits. In 1978, con-

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[1] M.C.C. of Florida, Inc. was a subsidiary of Michael Construction Co. A merger has since occurred and, therefore, no distinction between the two is necessary. The defendants will hereinafter be referred to simply as M.C.C.

struction permits for the Niles Channel Bridge were issued by the Corps and the DER. The application specified a conventional design which would have involved trucking the construction materials over land. The segmental construction method was not decided upon until the contract was awarded in 1980. The Corps and DER were not notified of the change.

The court found that there was damage to the bottom vegetation in two areas. Site # 1, located four miles from the bridge within the National Key Deer Refuge boundaries and Site # 2, located eight miles from the bridge within the National Key Deer Refuge and the Great White Heron National Wildlife Refuge. The permits issued by the Corps and the DER covered only areas within the DOT right-of-way.

It was during the spring of 1981 that the Corps and DER became aware of M.C.C.'s barge activities. Efforts were made to reach a solution. Failing to reach agreement, the Corps issued a Cease and Desist Order on August 7, 1981, prohibiting M.C.C.'s tugs from engaging in further dredge and fill activities in the subject areas. It was the contention of the Corps and DER that the tugs were engaged in dredging and discharging pollution into the water when the propellers of the tugs cut into the bottom, uprooting and destroying the sea grass and depositing bottom sediment on adjacent sea grass beds.

On October 7, 1981, DER and Corps personnel stopped one of M.C.C.'s tugs in the subject area and gave a copy of the Cease and Desist Order to the captain. The United States sought a temporary restraining order and on November 29, 1981, the district court held a hearing.

The district court refused to issue a restraining order but instructed the defendants to confine their tugboat trips to high tide and to alert Corps personnel of the time of their movements throughout the subject areas. The United States foved for a rehearing on the preliminary injunction which was denied. After the hearing on

the temporary restraining order, M.C.C. restricted the use of its larger tug and made some efforts to comply with the court's instructions limiting its tugboat activities. M.C.C., however, did not comply fully with the court's instructions. Its tugs made at least 112 movements through Niles Channel in connection with its construction work. Many of these movements were at night or in the poor lighting conditions of dawn or dusk.

The court found that there was extensive damage to the bottom vegetation at the two sites which had been caused by M.C.C.[2] The court stated that the "damage to the marine vegetation and the bottom sediments in Site # 1 is devestating [sic]. Acres formerly lush with vegetation have been completely denuded. The bottom scarring at Site # 2, although less severe, is still extensive and significant." The court also found that other unknown people had caused some of the damage. It held, however, that since the majority of the damage had been caused by M.C.C., it would not be unjust to hold M.C.C. responsible for all the damage.

The district court held that M.C.C. had violated the River and Harbor Act by dredging with its propeller system without a permit and had discharged pollutants in violation of the Clean Water Act by redepositing bottom sediment on adjacent sea grass beds. The court also held that M.C.C. had violated the similar Florida statutes.

The United States submitted two alternative plans for restoration of the damaged areas. The United States' preferred plan would have cost $793,414 and its alternative plan would have cost $742,063. M.C.C. did not submit any plan of its own. The district court rejected both of the government's plans because their chances of success were very speculative and their costs were so high.

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[2] The court found that there was insufficient evidence to establish that M.C.C. had engaged in any dredge or fill activities in a third site.

On appeal, we are faced with the questions of whether M.C.C.'s conduct was prohibited by the River and Harbor Act or the Clean Water Act. Also, we are asked to decide whether M.C.C. was entitled to a jury trial and whether the district court's remedy was appropriate.

River and Harbor Act

M.C.C. was found to have violated Section 10 of the River and Harbor Act. 33 U.S.C. § 403. This section provides:

> § 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in
>
> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless *the work* has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (Emphasis added).

M.C.C. argues that the term "work" means a planned intentional construction or undertaking. It contends that the dredging and fillings caused by the propellers of its tugs was not "work" since it did not specifically intend

to dredge a channel and fill the adjacent areas. Therefore, M.C.C. argues, it did not violate the Act.

The Supreme Court discussed this section in *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1980), and rejected the narrow interpretation of Section 10 which M.C.C. urges. The Court stated that the "philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342 [51 S.Ct. 478, 479, 75 L.Ed. 1104 (1931)], that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading either of § 13 or § 10." *Id.* at 491, 80 S.Ct. at 890.

In *Republic Steel*, the defendant was discharging solid industrial waste into a river. This progressively decreased the depth of the river. The court held that this activity violated the first clause of Section 10 which prohibits "any obstruction" not approved by Congress. In so holding, the court stated:

> The reach of § 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which proprohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army.

Id. at 486-7, 80 S.Ct. at 887.

Later, in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), the Court again emphasized the breadth of the language used by Congress. It stated that the River and Harbor Act of 1899 "was obviously intended to prevent obstructions in the Nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad." *Id.* at 201, 88 S.Ct. at 385. Clearly, the Supreme Court has rejected the narrow interpretation of Section 10 which M.C.C. has advocated. Congress has prohibited all activities which obstruct the navigable waters of the United States, not just those that fall within the third clause of Section 10.

But, even if we accept M.C.C.'s interpretation of Section 10, M.C.C.'s activities clearly fit within those that require a permit under the third clause of the section. The district court found that M.C.C. "willfully violated" the Act and described their behavior as "illegal and willful." Furthermore, the district court specifically found that M.C.C. "knowingly created the propeller-dredged channel." We can not say that the district court erred in its assessment of M.C.C.'s conduct.

M.C.C. made over 112 trips through the area with its tugs after it was served with a cease and desist order by the Corps. Also, M.C.C. failed to fully comply with the district court's instruction limiting the activities of its tugs. Repeatedly going back and forth across the subject areas with equipment that is dredging a channel and dumping the spoil on the adjacent sea grass beds clearly fits within the plain language of the third clause of Section 10. The fact that the equipment used was the propellers of a tug is immaterial. M.C.C. knew that its activities were dredging a channel and filling the adjacent areas. It did not comply with the district court's instructions which were designed to avoid, or at least limit, the damages. Although M.C.C.'s ultimate goal was

to construct a bridge for U.S. 1, as part of that work, it willfully and with full knowledge, dredged and filled in the subject areas.

Clean Water Act

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, prohibits, with certain exceptions not applicable in this case, the discharge of pollutants into the navigable waters of the United States. The term, "discharge of a pollutant" is defined as "(A) any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. § 1362(12). A "point source" is defined as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or *vessel or other floating craft*, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture."

33 U.S.C. § 1362(14) (emphasis added). The Act defines "pollutant" to mean:

> *dredged spoil*, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, *biological materials*, radioactive materials, heat, wrecked or discarded equipment, *rock sand*, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6) (emphasis added).

Clearly, the tugs used by M.C.C. were point sources since the Act specifically includes vessels within the meaning of that term. Furthermore, the vegeation and sediment that was redeposited on the adjacent sea grass bed was a "pollutant" since the Act includes "dredged spoil" in the definition of that term. The question presented to this court, therefore, is whether the redeposit-

ing of the spoil dredged by the propellers of M.C.C.'s tugs constituted a "discharge of a pollutant," within the meaning of the Act. M.C.C. contends that since the definition of "discharge of a pollutant" uses the word "addition," that the redepositing did not add anything to the waters of the United States and therefore it did not violate the Clean Water Act. We, however, conclude that M.C.C. did violate the Act by redepositing the vegetation and sediment on the adjacent sea grass beds.

Congress declared that the objectives of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The House Committee on Public Works, in a report which accompanied the House bill, stated:

> Subsection (a) of section 101 declares the objective of this legislation to be the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.
>
> The word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.
>
> * * * *
>
> Although man is a "part of nature" and a production of evolution, "natural" is generally defined as that condition in existence before the activities of man invoked perturbation which prevented the system from returning to its original state of equilibrium.
>
> This definition is in no way intended to exclude man as a species from the natural order of things, but in this technological age, and in numerous cases that occurred before industrialization man has exceeded nature's homeostatic ability to respond to change. Any change induced by man which overtaxes the

> ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation.

H.Rep. No. 92-911, 92d Cong., 2d Sess. 76-77 (1972), reprinted in 1 Legislative History 753, 763-764 (quoted in *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 625 (8th Cir.1979).

Given the broad objectives of the Clean Water Act, we are in agreement with the Fifth Circuit that the "word 'addition' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'" *Avoyelles Sportsmen's League Inc. v. Marsh*, 715 F.2d 897 (5th Cir.1983). The redepositing of spoil dredged up by the tug's propellers onto the adjacent sea grass beds clearly disturbs the "physical and biological integrity" of the subject areas. The damage done to those areas was too severe for nature to be able to restore them to their natural condition herself. Therefore, we affirm the district court's decision that M.C.C. violated the Clean Water Act.

Jury Trial

M.C.C. contends that it was entitled to a jury trial and that the district court therefore erred in striking its demand for one. The Seventh Amendment to the Constitution provides that in "Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. Amend. VII. The Supreme Court has held that it is "the nature of the issue to be tried rather than the character of the overall action" that is determinative. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970). When there are both legal and equitable issues present, then the right to a jury trial as to the legal issues remains. *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988

(1959). Therefore, we must examine whether any of the issues were legal in nature.

The Supreme Court in *Williamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1877), held that there was no common law of the United States which prohibited obstructions in navigable rivers. *Id.* at 8, 8 S.Ct. at 814. The River and Harbor Act of 1899 was passed by Congress to rectify this problem. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486, 80 S.Ct. 884, 887, 4 L.Ed.2d 903 (1960). Later, in *Wyandotte Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), the Court held that the government could bring suit to recover the cost of removing a sunken vessel even though the Act did not specifically provide for it. The analysis used by the court was equitable in nature.

The Supreme Court has also used an equitable analysis in interpreting the Clean Water Act. Recently, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d (1982), the Court stated that the Clean Water Act permitted "the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve *compliance* with the Act." *Id.* at 318, 102 S.Ct. at 1806 (emphasis added). It is clear that both the Clean Water Act and the River and Harbor Act issues were equitable in nature. Therefore, M.C.C. was not entitled to a jury trial.[3]

[3] Our attention is directed to *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985). In a financing agreement between K.M.C. and Irving, a paragraph stated that each party "waives all right to a trial by jury in any action or proceedings relating to transaction under this Agreement." The opinion discusses the necessity of a waiver being "knowing and voluntary." It is clearly inapposite. On the other hand the recent case of *United States v. Tull*, 769 F.2d 182 (4th Cir. 1985), is squarely in point in that the action was brought under the River and Harbor Act, 33 U.S.C. § 401, *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, the same as in the instant case. We incorporate

Remedy

The district court rejected the government's two alternative restoration plans because it determined that their prospect for success was too speculative and that they were too costly. In *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir.1976),[4] the Fifth Circuit stated that the "degree and kind of wrong and the practicality of the remedy must be considered in the formulation of that remedy." *Id.* at 1301. In the case at bar, that is precisely what the district court did in rejecting the government's plan. Instead, the district court required M.C.C. to pay to the court $200,000 to be used in restoration of areas in South Florida, and a $20,000 fine.

We concur with the district court's findings and conclusion that the government's two alternative restoration plans were too speculative and costly. We cannot concur in the requirement that M.C.C. pay to the court $200,000 to be used in restoration areas in South Florida without any specific plan having been suggested or submitted. We concur in the district court's conclusion that where on-site restoration cannot be feasibly accomplished, mitigation is an appropriate remedy. We note the district court's adoption of the remedy in *United States v. Board of Trustees of Florida Keys Community College*, 531 F.Supp. 267 (S.D.Fla.1981). In that case the court sim-

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the reasoning of Chief Judge Winter in *Tull* as further authority for our conclusion on the jury trial issue.

[4] On August 26, 1985, appellants filed a motion to supplement the record, a suggestion of mootness, and a motion to vacate. These matters, while appearing to be newly discovered, may, or may not, affect the remedy which we have remanded to the district court. In permitting further evidence to be submitted, we suggest that the issues raised by this post-argument motion should be explored. We do not intimate in any manner what the final result should be; nor do we make any finding that the damages previously determined by the district court are in any way affected by the issues raised by appellants in their post-argument motions.

ilarly concluded that restoration of the destroyed site was too expensive and was infeasible, and required the defendant to provide an alternative beneficial environmental area comparable to the destroyed area and one that would serve the same purpose. We concur in the district court ordering such a remedy but remand for the purpose of the court requiring the defendant to prepare and submit a substitute environmental plan together with estimated costs. The parties should have ample opportunity to confer with one another about such an alternative remedy. The district court should retain jurisdiction to assess the costs of such a remedy and to insure its implementation by giving court approval to the plan and the methodology to be used and the parties responsible for performing the alternative appropriate environmental remedy.[5]

The government asserts that the district court abused its discretion in refusing to order M.C.C. to restore areas of the Niles Channel. We agree with the district court and, additionally, we should note that, as to certain areas of the Niles Channel, the recent developments mentioned in footnote 4 may be included therein.

For the reasons stated in the foregoing opinion this case is AFFIRMED in part, REVERSED in part, and REMANDED.

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[5] The decisions of the Fifth Circuit prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-2373-CIV-EBD

UNITED STATES OF AMERICA,
Plaintiff,

and

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL REGULATION,
Plaintiff/Intervenor

vs.

MCC OF FLORIDA, INC., *et al.*,
Defendants.

[Filed May 13, 1982]

ORDER

THIS MATTER is before the Court on the Motion of the Plaintiff/Intervenor to Strike the Demand for Jury Trial in the Defendants' Answer to the Intervenor's Complaint. The Court has reviewed the motion, memorandum of law and all opposing papers. Based upon an evaluation of the arguments presented, in light of the entire record in this case, it is

ORDERED and ADJUDGED that the Motion is GRANTED. The demand for jury trial is hereby stricken from the Defendants' Answer. This ruling does not ad-

dress the demand for jury trial contained in the Defendants' Counterclaim.

DONE and ORDERED at Miami, Dade County, Florida, this 13th day of May, 1982.

/s/ Edward B. Davis
United States District Judge

Copies furnished to:

Paul R. Ezatoff, Jr.
Thomas A. Harris, Esq.
James T. Hendrick, Esq.
Clay McGonagill, Jr.,
Michael J. Mitchell, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-2373-CIV-EBD

UNITED STATES OF AMERICA,
Plaintiff,

and

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL REGULATION,
Plaintiff/Intervenor

vs.

M.C.C. OF FLORIDA, INC., *et al.*,
Defendants.

"The Court: Reviewing again my order of May 13th, it seemed to me at this point the only thing that I left open, as I view it, was the counterclaim. But I struck it as to your demand for the jury trial."

Oral ruling of the district court, Nov. 1, 1982.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-2373-CIV-EBD

UNITED STATES OF AMERICA,
Plaintiff,

and

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL REGULATION,
Plaintiff/Intervenor

vs.

M.C.C. OF FLORIDA, INC., *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT FOLLOWING LIABILITY HEARING (12/17/82)

THIS MATTER has come before the Court for trial without a jury. Based upon the admissible evidence adduced at trial and the arguments of counsel, the Court does make and enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1). This is a civil action by the United States of America under the Rivers and Harbors Act, 33 U.S.C. § 403, *et seq*, and the Clean Water Act, 33 U.S.C. § 1311, *et seq.*, seeking restoration and civil penlaties.

2). The Plaintiff/Intervenor, the State of Florida Department of Environmental Regulation, [D.E.R.], Statutes [*sic*] and also seeks restoration. The D.E.R. has withdrawn their claim for civil penalties.

3). A counterclaim has been brought against the United States under 28 U.S.C. s 2412 for attorneys' fees, experts' fees and expenses. Similarity [*sic*], a counterclaim has been brought against the D.E.R. for general damages.

4). The Defendant, Michael Construction, is a Tennessee corporation and the parent corporation of M.C.C. of Florida, Inc.

5). The Defendant, M.C.C. of Florida, Inc., is a Florida corporation whose principal business involves bridge construction.

6). Niles Channel is a navigable waterway connecting the Bay of Florida with the Atlantic Ocean.

7). The Niles Channel Bridge supports U.S. Highway 1 over Niles Channel. This bridge was one of thirty-seven bridges to be replaced as part of the Florida Keys Bridge Replacement Program.

8). M.C.C. of Florida is the prime contractor for the construction of a replacement bridge over Niles Channel.

9) In competitive bidding, M.C.C. of Florida, Inc., was awarded the contract for construction of the Niles Channel Bridge. The Florida Department of Transportation [D.O.T.] had requested bids for the alternate methods of construction: conventional girder and segmental construction. M.C.C. of Florida's bid for segmental construction was the lowest overall bid.

10). In late December, 1980, the D.O.T. entered into a contract with M.C.C. of Florida for construction of the Niles Channel Bridge. The contract called for segmental construction.

11). The D.O.T. has assumed the responsibility for acquiring permits from all concerned state and federal agencies for construction of the Niles Channel Bridge, as well as the other thirty-six bridges which were part of the replacement program.

12) In 1975, prior to the construction of any of the thirty-seven bridges, a Draft Environmental Impact Statement was prepared jointly by the Federal Highway Administration and the Florida D.O.T.

13). The Environmental Impact Statement noted that the bridge replacement project would cause damage to marine vegetation and to marine life, however, the damage would be temporary and the areas sustaining the damage were not considered unique. It further noted that "while U.S. 1 passes by and provides access to the Great White Heron National Wildlife Refuge and the National Key Deer Refuge along with several lesser sanctuaries, no area of these preserves or species habitat within these preserves is affected by the construction areas of the bridge replacement project".

14). After consideration and opportunity for input by all concerned agencies including the D.E.R. and the Department of Army, Corps of Engineers [Corps], a negative declaration was issued with respect to the Environmental Impact Statement.

15). The D.O.T., consistent with predictions set forth in the Negative Declaration, altered the design of the Niles Channel Bridge raising it from the original proposal of 15 feet to a height of 40 feet. The Corps and the D.E.R. were aware of this height change and did not challenge it.

16). The decision to employ a segmental construction method rather than conventional girder design was not finally made until the contract was awarded in 1980.

17). When construction permits for the Niles Channel Bridge were issued by the Corps and the D.E.R. in 1978,

a conventional design was specified in the applications. This method contemplated materials to be trucked in on overland roads.

18). Neither the Corps nor the D.E.R. learned of the change to segmental construction until 1981 when actual construction had begun. No modification was ever made in the applications or the permits to reflect the change in construction methods.

19). Segmental construction required the barging of bridge segments. The segments needed for this method of construction were too heavy and cumbersome to be brought to the bridge site on an overland route.

20). The Defendants had a casting yard on Conch Key where they formed the bridge segments used on the Niles Channel Bridge. These segments, along with other construction materials, were loaded on barges and taken from the casting yard in a southwesterly direction through Florida Bay down to the Niles Channel construction site.

21). The Defendants used two tugs for the transportation of bridge segments from Conch Key to the bridge site: the "LiL' Pal" and the "Annie L II". Michael Construction Company is the record title holder of both tugs. M.C.C. of Florida leased these tugboats from Michael Construction Company and operated them in their work on the Keys bridges.

22). The route the Defendant's tugboats travelled from the casting yard to the bridge site encompassed the three areas which are the subject of this litigation. These areas have been designated in the following manner: Site # 1 —this site is located north of U.S. Highway 1 in Niles Channel approximately halfway between Toptree Hammack Key and Big Torch Key; Site # 2—this site is located northwest of site # 1 in Niles Channel adjacent to Raccoon Key; and Site # 3—this site is located between Cudjoe Key and Big Spanish Key in a shallow section of Big Spanish Channel.

23). *Site # 1 is approximately* 4 miles from the bridge. Site # 2 is approximately 8 miles from the bridge. Site # 3 is approximately 20 miles from the bridge.

24). Site # 1 is located within the boundaries of the National Key Deer Refuge. Site # 2 and Site # 3 are located within the boundaries of both the National Key Deer Refuge and the Great White Heron National Wildlife Refuge.

25). The bottom communities at the subject sites are characterized by lush seagrass vegetation. Species present include: turtle grass (Thalasia); manatee grass (Syringodium) and Cuban shoalweed (Haledule), turtle grass being the most prevalent. The seagrass beds play an essential role in the areas unique eco-system. These beds form the critical base link in the aquatic food chain and serve as a habitat and/or spawning ground for such marine species as lobster, shrimp, stone crab, snapper and grouper. The disappearance of any sizeable area of the seagrass beds causes significant disruptions to the ecosystem of this shallow water marine community.

26). The construction permits issued by the Corps and the D.E.R. for the Niles Channel Bridge covered only areas within the D.O.T. right of way.

27). Niles Channel, the location of Site # 1 and Site # 2, is a shallow tidally influenced body of water running between Florida Bay and the Atlantic Ocean. Water depths through the Channel range from 0′ mean low water to —23′ mean low water. The bulk of the area is heavily vegetated by marine grasses and algae beds. Two deep areas exist in Niles Channel: one, a narrow channel running from Florida Bay through Cudjoe Channel to the north and two, an isolated trench immediately to the northeast of Treetop Hammock Key.

28). Big Spanish Channel is a navigable tidal waterbody running in a north-south direction between Florida

Bay and the Florida Straits. The channel is vegetated throughout with marine seagrass. Controlling depths through the navigable portions of the Channel are —5′ to —6′ mean low water.

29). During the spring of 1981, the Corps and the D.E.R. first became aware of the Defendants barge activities in the subject areas. Efforts were made to work out a solution that would be acceptable to all concerned parties. These efforts were unsuccessful.

30). On Agust 7, 1981, the Defendants were served with a Cease and Desist Order by the Corps prohibiting the Defendants' tugs from engaging in further dredge and fill activities in the subject areas.

31). On September 4, 1981, the Defendants and D.O.T. officials met with the representatives of the Corps and the D.E.R. in an attempt to formulate an agreement concerning tug barge movements in Niles Channel. The meeting concluded without an agreement.

32). On October 7, 1982, D.E.R. and Corps personnel observed repeated movements of the Defendants' tug "Annie L II" through the area designated as Site I. Some of these movements were for purposes other than the transportation of heavy materials and equipment. The functions performed during these movements could have been accomplished through the use of smaller work boats which would not cause bottom scarring. The Defendants were also given a copy of the Corps previously issued Cease and Desist Order at this time.

33). During September and October of 1981, the Defendants continued tug and barge movements in the subject area and this action was brought. On November 29, [*sic*; October 29] 1981, an injunction hearing was held concerning the Defendants' conduct.

34). Following the hearing, the Court denied the government's motion for a preliminary injunction, however,

the Defendants were instructed to confine their tugboat trips to high tide and to alert Corps personnel regarding the time of their movements through the subject areas.

35). On some, but not all occasions, the Defendants contacted Corps personnel regarding the movements of their tugs and barges through Niles Channel.

36). Following the November preliminary injunction hearing the Defendants restricted to a large extent, the use of the larger tug "Lil' Pal" in Niles Channel.

37). The Defendants made some effort to conduct their tug and barge movements in Niles Channel during high tide periods, although they did not do so in all instances.

38). The Defendants' tugs made at least 112 movements through Niles Channel in connection with the bridge project. Many of these movements were at night or in the poor lighting conditions of dawn or dusk.

39). Personnel from the Corps and the D.E.R. have personally observed channel dredging and filling by the propeller systems of the Defendants' tugboats in the areas designated as Site #1 and Site #2.

40). The on-site observations by D.E.R. and Corps personnel detail Channel dredging by the propeller systems of the Defendants' tugs of depths of up to two feet. Also observed on these occasions was the accompanying uprooting and destruction of sea grass, as well as the deposition of bottom sediment on adjacent sea grass beds.

41). Log records and on-site observations by the Corps personnel establish several groundings by the Defendants' tugs and barges in the subject areas.

42). The Defendants' tug activities have, on at least three occasions, caused turbidity over an extensive area well in excess of fifty Jackson Units above the natural functioning of the marine eco-system.

43). The damage to the marine vegetation and the bottom sediments in Site #1 is devestating [*sic*]. Acres formerly lush with vegetation have been completely denuded. The bottom scarring at Site # 2, although less severe, is still extensive and significant.

44). There is insufficient evidence to establish that the Defendants engaged in any dredge and fill activities in the area designed as Site # 3.

45). There were alternative methods of transporting bridge segments which would have avoided any impact on the subject areas, the least costly of which would have been the use of shallow-draft tugboats. The Defendants considered and rejected these alternatives.

46). Neither the Corps nor the D.E.R. engaged in acts or tactics of harassment in their investigation and enforcement efforts with respect to the Defendants activities.

CONCLUSIONS OF LAW

1). This Court has subject matter jurisdiction over the issues raised in the pledings of this law suit pursuant to 28 U.S.C. § 1345 and 33 U.S.C. § 403, 406, 1311 and 1319.

2). The Complaint charges the Defendants with violations of the Rivers and Harbors Act. Section 10 of this Act states in part:

> . . . it shall be unlawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, arbor, canal, lake, harbors of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same . . . 33 U.S.C. § 403.

3). "Navigable waters" are those waters subject to the ebb and flow of the tide and/or are presently used or have been used in the past, or are susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4.

4). The areas which are the subject of this litigation are "navigable waters" within the meaning of the Rivers and Harbors Act.

5). Section 10 of the Rivers and Harbors Act has been broadly construed in determining if violations have occurred. *U.S. v. Republic Steel*, 362 U.S. 482 (1960); *See U.S. v. Moretti*, 526 F.2d 1306 (5th Cir.1976).

6). The Defendants have committed violations of Section 10 of the Rivers and Harbors Act. These violations occurred when the propeller systems of the Defendants' tugboats made contact with the sea bottoms uprooting sea grasses and causing the adjacent areas to become filled with dredged materials. Such excavation and fill activities by boat propellers, of the extent and devestation which occurred in this instance, constitutes channel dredging.

7). The fact that the Defendants mistakenly placed reliance on the D.O.T. to obtain the necessary permits for them does not excuse the violations. *U.S. v. Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267 (S.D.Fla.1981).

8). The awareness of the change in bridge height on the part of the Corps and the D.E.R. prior to the commencement of construction did not constitute a waiver of the permit requirements. *U.S. Board of Trustees of Florida Keys Community College, supra.*

9). The Clean Water Act, 33 U.S.C. § 1311, *set seq.* sets up a comprehensive regulatory scheme which prohibits, with certain narrow and well defined exceptions, the discharge of pollutants into the navigable waters of the United States.

10). The term "discharge of a pollutant" is defined in 33 U.S.C. § 1362 (12) as follows:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source. (B) any addition of any pollutant to the waters on the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

11). The term "point source" is defined in 33 U.S.C. § 1362 (14) as follows:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(12). The term "point source" expressly includes vessels and has been found to encompass bulldozers, dump trucks, land-clearing equipment and ditch excavation equipment. *See U.S. v. Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980).

(13). The Defendants' tugboats are point sources within the meaning of the Clean Water Act.

(14). Dredge spoil, sand and biological materials are listed as "pollutants" in Section 1362(6) of the Clean Water Act. *See Weiszmann v. District Engineer, U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976).

(15). The Defendants have violated the Clean Water Act. These violations occurred when the propeller systems of the Defendants' tugboats dredged channels in the sea bottom of the areas designated as Site # 1 and Site # 2. This propeller dredging caused dredge materials,

sand and biological materials to be deposited on the adjacent seagrass beds. The extent of the harm to the impacted environment caused by these violations is far too severe and significant to be considered de minimus.

(16). Niles Channel and the subject areas of this action are "water of the State" as that term is defined in Section 403.031(3) of the Florida Statutes.

(17). Dredging and filling in waters of the State without a permit constitutes violation of Section 403.161(1)(b).

(18). Dredging, as defined in Rule 17-4.02 (12) of the Florida Administrative Code is "excavation, by any means". The excavation of bottom sediments by the propeller systems of the Defendants' tugs constitutes dredging within the meaning of this Rule.

(19). Because no permit has been obtained for dredging activities outside the D.O.T. right of way, the Defendants' propeller excavations in Niles Channel were in violation of Section 403.161 (1)(b).

(20). Pollution is defined in Section 403.031(2) of the Florida Statutes in the following manner:

> Pollution is the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

(21). The Defendants' dredging activities has resulted in the destruction of lush seagrass beds. This destruction has taken two forms: uprooting through direct contact with the propeller systems of the Defendants' tugboats; and habitat displacement as a result of the deposition of dredge materials on adjacent beds.

(22). The destruction of the seagrass beds has adversely altered the physical and biological integrity of the waters of Niles Channel. This has had a harmful and destructive effects on the marine communities which live and breed in this area.

(23). The Defendants' dredging activities have caused pollution in violation of Section 403.161 (1) (a) of the Florida Statute.

(24). Turbidity in excess of fifty Jackson Units above the natural background is pollution above the acceptable level as set forth in Rule 17-3.061 (2) (b) of the Florida Administrative Code. It is a violation of Section 403.161 (1) (a) and (b) of the Florida Statutes to cause turbidity in excess of this standard. The Defendants, on at least three occasions, have violated this statute.

(25). The Corps and the D.E.R. acted reasonably in their efforts to prevent environmentally harmful violations within the respective spheres of their jurisdiction. There was no harassment by either agency as to these Defendants.

(26). The Counter-plaintiffs have failed to establish any damages which they may have suffered as a result of any act or position taken by the D.E.R.

(27). The Counter-plaintiffs have not prevailed on either of their counterclaims.

The Court reserves ruling on the issues of restoration and civil penalties in order to afford the parties sufficient opportunity to study the restoration alternatives. A separate hearing on these issues will be set by future order.

DONE and ORDERED this 17th day of December, 1982.

/s/ Edward B. Davis
United States District Court Judge

Copies Furnished to Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-2373 CIV-EBD

UNITED STATES OF AMERICA,
Plaintiff,

and

STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL REGULATIONS
[*sic*; REGULATION],
Plaintiff/Intervenor,

vs.

M.C.C. OF FLORIDA, INC., *et al.*,
Defendants.

[Filed March 12, 1984]

ORDER ON RESTORATION HEARING

This matter came to be heard without a jury to determine the appropriate remedies and civil penalties for the defendants' violations of the Rivers and Harbors Act, 33 U.S.C. sec. 403 *et seq.* and the Clean Water Act, 33 U.S.C. sec. 1311 *et seq.* On December 17, 1982, the Court issued findings of fact and conclusions of law on the liability phase of this trial. In that Order, the Court found that the defendants committed violations of 33 U.S.C. sec. 403, 33 U.S.C. sec. 1311 *et seq.*, and Fla.Stat. 403.161(1)(a) by uprooting seagrasses with the propellers of their tugboats in certain areas of Niles Channel and by causing

adjacent areas to become filled with dredged materials. These propeller tracks were made by the tugboats as they transported segments of a bridge to the bridge construction site at Niles Channel.

It was found that the damage had "adversely altered the physical and biological integrity of the waters of Niles Channel. This has had a harmful and destructive effect on the marine communities which live and breed in this area." (Conclusion of Law No. 22). The extent of the harm was significant.

Prior to the remedies phase of this trial, the government submitted a restoration proposal containing two alternate plans. The restoration hearing dealt mainly with the merits of the proposal—whether it was feasible and whether it was appropriate under the circumstances. Although the defendants suggested that any remedy be limited to a small off-site mitigation project, they basically used the hearing to attack the government's proposal. The State of Florida was also represented at the hearing.

FINDINGS

A. *Description of Sites 1 and 2*

Sites 1 and 2 are located in an area of the Florida Keys called Niles Channel, a navigable waterway connecting the Bay of Florida with the Atlantic Ocean. Site 1 is located north of U.S. Highway 1 in Niles Channel approximately halfway between Toptree Hammock Key and Big Touch Key. Site 2 is located northwest of site 1 in Niles Channel adjacent to Raccoon Key.

Site 1 is an area covered with Thalassia testudinum, known as turtle grass. The depth of the water is 3-4 feet mean low water. In site 1 lies a propeller-dredged channel running north-south for about 2000 feet. (G.Exh. 97). Its width ranges from 50 to 200 feet and its depth in the center contains portions 2.5 to 3 feet below

the natural bottom elevations. Next to the channel are individual propeller tracks—also called scars or cuts—which range from 18 to 42 inches wide and 12 to 15 inches deep. (G.Exh.97;T.Lewis,Bishof).

The dredged channel was formed by individual propeller tracks which coalesced. The channel is, to a significant extent, bare of any vegetation. (G.Exh.93(1-11); 112-120). There are scattered islands of Thalassia remaining within the channel. New growth consists mainly of rhizophytic green algae with only a very limited new appearance of seagrasses. (D.Exh.57,58,59,90A,90B;T.Zieman,Lewis).

The sediment is quite deep except in the extreme south. (T.Zieman). Sediment depth varies from a thin layer over the caprock to extensive areas where the sediment is greater than 3 feet deep. As a result of the propeller dredging, sediment in some areas was thrown onto the adjacent seagrass beds. (G.Exhs.97,98).

The areas that have been heavily damaged by the defendants now serve none of the beneficial environmental functions which they served formerly. The areas moderately and lightly damaged presently serve very limited environmental functions.

At site 2 there are propeller-dredged cuts of up to two miles long. (G.Exh.97). In some areas the cuts have coalesced and all seagrass cover has been eliminated. The individual propeller tracks at site 2 range from 18 to 54 inches in width. (Gov.Exh.97;T.Bishof,Lewis). The sediment structure at site 2 is less disturbed than at site 1. At most locations at least 12 inches of sediment remains in the propeller cuts. Only minimal natural recolonization has occurred at site 2. This minimal recolonization consists of the same pioneering algae found at site 1. (T.Zieman,Lewis).

Site 2 is in general shallower than site 1. There has been no substantial undercutting of the rhizome structure as has occurred at site 1. (T. Ziemān).

B. *Size of Sites 1 and 2*

The parties disagree on the extent of the actual area damaged. The government presented a seagrass damage classification scheme using four categories of damage. (G.Exh.98,100) : 100% seagrass removal due to (1) heavy track damage due to individual propeller cuts (2) heavy excavation due to coalesced propeller cuts (3) heavy spoil damage due to the deposition of excavated spoil; and (4) 50% removal of seagrass due to closely spaced but uncoalesced propeller cuts. David Bishof of the Florida Department of Environmental Regulation used a ruler to measure individual propeller scars selected at random. The features actually measured were then found on an aerial photograph so that the photograph could be scaled. (T.Lewis). Based on the aerial photographs, the government estimates that the actual area of damage at site 1 is 7.74 acres and at site 2 is 19.35 acres. (G.Exhs.97,98, 100;T.Lewis).

The defendants, on the other hand, claim that the government's estimate of the damage at the two sites is greatly inflated. Sandford Young, a private environmental consultant appearing for the defendants, measured site 1 by "eyeballing" the channel on a scaled aerial photograph and counting the individual tracks. On cross examination, the government had Young calculate the total area of site 1, draw a rectangle representing that area to the scale of an aerial photograph, and superimpose his estimated area on the photograph. (G.Exh.122; D.Exh.61). The Court notes a significant discrepancy between the defendant's estimate and the contours of site 1 on the aerial photograph. Although the government's calculation seems to overstate parts of both sites, and although Mr. Bishof's random measurements may have

been skewed towards the wider portions of the channel, the Court accepts the government's figures as a fairly reliable estimate of the damaged area in Niles Channel.

The defendants object to being charged with all the scarring at sites 1 and 2. One defense witness, Rex Latta, testified that he observed propeller tracks in the Niles Channel area before the defendants began their tugboat operations. The Court does not doubt that propeller scars were in existence before the defendants entered the area, and that tracks were created by others both during and after construction of the bridge. However, it is clear that the defendants made at least 112 trips through the same area in connection with the bridge project (Finding of Fact No. 38), and that the dredged channel as well as a majority of the individual scars were created by the defendants' tugs. Under the circumstances, the court does not believe it is unjust to hold the defendant responsible for the entire damage in that area. The defendants have not shown this Court that the extensive damage at sites 1 and 2 existed to any significant degree before they began their activities.

C. *Regrowth of the Dredged Areas Without Restoration*

The Court finds that turtle grass beds are the climax community in south Florida marine waters. (G.Exh.94). They possess the highest biomass and primary productivity, are best able to stabilize the ocean sediment, and support a more diverse and abundant animal community than other seagrass beds. (G.Exh.131,132).

When an area is denuded of turtle grass, the species succession process must start all over again. The first species to appear are the pioneering rhizophytic green algae. These algae provide a limited amount of sediment binding capability, and do not stabilize an area very well. The algae are succeeded by shoal grass, Halodule wrightii, which further stabilizes the sediment and creates a more

productive environment. In some, but not all areas, manatee grass, Syringodium filiforme, is the next developmental sequence.

Turtle grass maintains extensive rhizome and root systems which trap and retain particles in the sediment with much greater efficiency than the predecessor species. Because of its large leaves, turtle grass offers a much larger surface area than the other grasses, permitting a great increase in the colonization of epiphytic algae and fauna. In addition, the larger leaf area of turtle grass has a greater baffling and sediment trapping effect, thus enhancing internal nitrogen recycling.

The natural succession of plant species from rhizophytic algae to turtle grass takes many years. When an area is dredged, this process must start over from the initial stage.

Several scientific studies have shown that even in the absence of disturbance, turtle grass recolonizes dredged areas very slowly. Numerous areas in the Florida keys, dredged many years ago, still have not been fully recolonized. Furthermore, in areas that are subject to continued or repeated disturbances, the successional development may be permanently arrested at any point along the developmental gradient.

The succession of seagrass species just recounted and the evaluation of the relative benefits of the various seagrass and algal species is supported by the publications of the experts for both sides. (G.Exh.85,133,135, 140,142;T.Zieman).

Without any restoration, the linear seagrass islands in the channel will suffer erosion as depicted in G.Exh.91. (T.Zeiman). Erosion will also occur at the periphery of the channel, destroying more of the seagrass bed. (T. Zieman). The sides will eventually reform and reprofile to form a more stable configuration. (D.Exh.90;T.Wan-

less). The seagrass beds upon which sediment was deposited will likely be smothered; furthermore, without the baffles or other similar physical barrier placed at the ends of the dredged channel, deeper draft boats will continue to use the channel and thereby slow, if not prevent, the recovery of the seagrass beds in the channel. (G.Exh. 142;T.Zieman)

D. *Practicality of the Government's Plan*

The government's preferred plan requires that baffles be placed at both ends of the channel, and that the channel be filled with sand. Aprons would be installed around the baffles to prevent scouring or undermining of the breakwater. The channel, as well as the tracks outside the channel, would be planted with anchored Halodule shoots on 2-foot centers. Once the area was stabilized, Thalassia would be planted on 3-foot centers. At site 2, the government proposes to similarly plant Halodule, followed by Thalassia. To prevent the breakwater from becoming a hazard to navigation, warning markers would be placed at the site and a reference made on navigation charts. According to the government, the backfilling and baffles at site 1 would prevent large boat traffic from entering site 2 and causing additional damage. (G.Exh. 97).

Experts for both sides testified to successful seagrass plantings in the waters of south Florida. (T.Thorhaug, Lewis). All basically agreed that restoration in Niles Channel presents difficulties not generally encountered in other plantings: the high energy currents at the sites, the scope of the project; the volume and type of backfill to be used, and the interaction of these elements.

David Tackney, a hydrologist called by the government, testified that the velocity of water differs over the length of the water column. He found that the highest velocities were in the lower center part of the channel. Furthermore, he testified that the sheer stress, or bottom re-

sistance, was low enough to allow the sediment to move; hence, it would be necessary to construct baffles to lessen the current velocity. The government proposal incorporates a baffle design submitted by Tackney. Although there would be some sediment loss, he estimated it to be no more than 2%. He would not venture a guess as to the sediment loss during a hurricane, although he believed that the island grouping around the site 1 and 2 areas would act as a sufficient buffer. Tackney was not aware of any other project similar in scope or design to the government's proposal.

The defendants put on Roger Walness [*sic*; Wanless] a marine sedimentologist. He disputed Tackney's conclusions, stating that the current shows no respect for the channel and would not be slowed by the baffles. (D.Exhs., 67,68,69). He said the current in the north end relates to the deeper part of the Niles Channel area called Mary's Hole, that sediment was drifting to the east, and that the velocity at the bottom of the channel was less than at the surface. The observations and conclusions of Roger Wanless were based mainly on surface patterns, such as in D.Exhs.65,66. Tackney insisted that surface currents do not reveal the true tidal velocities at the bottom where the plants would be anchored. On cross-examination, Wanless said that his opinions were not based on measurements of sheer stress or grain size, but that bottom resistance was calculated in a qualitative sense after analysis of the sediments, samples of which he presented at the hearing. His opinion was that the bottom mud was cohesive, more so in the north.

Prior seagrass plantings have involved much less acreage than the 27.09 acres at issue in this case. Both Robin Lewis and Anitra Thorhaug attempted test plantings in the channel at site 1. Neither planting was successful. It is the government's position that the backfilling and baffles are necessary ingredients for a successful planting in that area.

Under the government's alternate plan, the sites would not be restored to their original state. The channel would be filled with crushed rock and sand fill. Halodule would be planted in the spaces of the rock fill over about 25% of the surface, while individual propeller tracks would be fully planted. Under this plan, baffles would be unnecessary, although the government would still post warning markers.

The Court finds that the government's preferred plan is a highly speculative undertaking with an insufficient guarantee of success. Tackney's methodology is more rigorous than that of Wanless, and the Court accepts Tackney's testimony that different current velocities may be found at different depths. The Court does not, however, have confidence that the bottom current will run down the channel and that the baffles designed by Tackney will adequately prevent 18,000 cu. yards of sand screenings dumped on the ocean floor from migrating, causing the plantings to uproot and despoiling the neighboring seagrass beds. Neither Tackney nor anyone else testifying at the hearing had heard of or had undertaken a planting in such a high energy environment. Lewis was not aware of any successful planting with sandfill, or within a navigable channel.

In addition to the problems of current and sand, there is the question of whether the seedlings would survive. Even discounting the special problems encountered at sites 1 and 2, the recolonization of a seagrass bed is still an uncertain undertaking. (G.Exh.139). Towards the end of the hearing, each side spent some time disparaging the success rate of the other's expert at the Lake Surprise project. In his deposition, Richard Lotspeich, an Environmental Specialist for the Department of Environmental Regulation, described Lake Surprise as an easy area in which to plant. (D.Exh.97). If the replanting experts encountered problems in the quiet water of Lake Surprise, the Court must be wary of the success of a planting

at Niles Channel. The government assured the Court that Robin Lewis would guarantee his work. On cross examination, his unconditional guarantee sounded less ironclad.

The government's alternate plan poses fewer problems, especially in regard to sand movement. Still, such a fill project, never before attempted, is a speculative undertaking too. Many fewer plants would be introduced into the area, reducing the chances of survival, and creating a different and, according to the government, less productive area than the original Thalassia bed.

Both plans are very expensive. They greatly exceed the cost per acre of other restoration projects in the area. (D. Exh.97,pp.9-14). If the Court believed that the government's preferred plan would work, it would be inclined to order the defendants to pay for the total restoration of sites 1 and 2. If the Court were convinced that the alternate plan would work, and would create the maximum environmental benefit, it would order it into effect. However, those assumptions cannot be made, and so cost must be placed on the scales, along with all the other factors previously discussed. On balance, the Court finds that the costs for the government's plans are excessive and inequitable in light of the speculative nature of the undertaking. The high cost and the tenuous chances of success overcome even the defendants' willful violation of the pollution and environmental laws. Were the Court to adopt the government's plan, it would in effect be assessing a fine to conduct an experiment in which the Court cannot place its confidence. Such a decision would not be a prudent response to the fact [*sic*] of this case.

CONCLUSION

1. The defendants willfully violated 33 U.S.C. sec. 403 and 33 U.S.C. sec. 1311 *et seq.* The Court's findings of fact and conclusions of law, entered in this case on De-

cember 17, 1982, are hereby adopted and made a part of this Order.

2. For violations of 33 U.S.C. sec 403, "the district court has powerful tools at its disposal in fashioning relief." *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976). Under 33 U.S.C. sec. 1319(d), the Court may impose a fine for violations of the Clean Water Act.

3. In *Sexton Cove Estates, supra*, 526 F.2d at 1301, the Fifth Circuit discussed the general standards for evaluating a restoration plan. *U.S. v. Weisman*, 489 F.Supp. 1331, 1343 (M.D.Fla. 1980) condensed those standards into a three-part test. A restoration plan must:

(a) confer maximum environmental benefits

(b) be achievable as a practical matter

(c) bear an equitable relationship to the degree and kind of wrong which it is intended to remedy

4. The Court concludes that the government's preferred plan, if feasible, would confer the maximum environmental benefits to the Niles Channel area. The alternate plan, if feasible, would confer lesser benefits.

5. At this stage in our scientific knowledge and experience, the planting of 27.09 acres of seagrass seedlings on 18,000 cubic yards of sand fill in a area of the ocean floor with high tidal velocities is not achievable as a practical matter. The government's alternate plan is somewhat more achievable. Still, it is highly speculative that the plan can be physically implemented and that it would create a productive habitat.

6. Although the defendants knowingly created the propeller-dredged channel and tracks at sites 1 and 2, the Court concludes that the cost of the government's restoration proposal is excessive in the extreme. The cost per acre is far beyond the restoration costs for other seagrass plantings in the area. (D.Exh.81).

7. Although the cost of the proposal is excessive, the court might order the defendants to pay for the government's plans if they were practical and reasonable. However, the Court concludes that they are not, and therefore, the cost factor assumes greater prominence in the weighing of the equities of this case. The Court concludes that the government's proposal bears no equitable relationship to the degree and kind of wrong it was intended to remedy.

8. Although the Court rejects the government's probposals, it does not believe that the defendants should be permitted to escape the consequences of their illegal and willful behavior. There need not be a choice between no action and complete on-site restoration. There is a third alternative—mitigation. Where restoration is not feasible, but the intent of the environmental laws can nonetheless be implemented by preserving another endangered or destroyed area, mitigation is an appropriate remedy. One other court in this district has already seen fit to follow this path when warranted. *U.S. v. Board of Trustees of Florida Keys Community College*, 531 F.Supp. 267 (S.D.Fla. 1981).

9. The defendants shall pay to the plaintiffs the sum of $200,000. That sum shall be used for restoration of seagrass beds in south Florida under a plan to be approved by the Court.

10. The defendants shall pay to the plaintiffs the sum of $20,000 as a penalty for violating 33 U.S.C. sec. 403 and 33 U.S.C. sec. 1311 et seq.

11. The plaintiffs shall have thirty days from the date of this Order to either submit a stipulation on how the damages assessed against the defendants shall be allocated between plaintiffs, or to submit individual proposals on that issue.

DONE AND ORDERED this 12th day of March, 1984

/s/ Edward B. Davis
United States District Judge

cc: David Dearing, Esq.
Thomas Harris, Esq.
Paul Ezatoff, Jr., Esq.
James Hendrick, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-2373 CIV-EBD

UNITED STATES OF AMERICA,
Plaintiff,

and

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATIONS,
Plaintiff/Intervenor,

v.

M.C.C. OF FLORIDA, INC., *et al.*,
Defendants.

ORDER (1) DENYING DEFENDANTS' MOTION FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND (2) DENYING PLAINTIFF'S MOTION TO ALTER JUDGMENT AND TO AMEND JUDGMENT

THIS MATTER has come before the Court upon the following motions:

1. Defendants' Motion for New Trial or to Alter or Amend Judgment; and,

2. Plaintiffs' Motion to Alter Judgment and to Amend Judgment.

After careful consideration of the briefs submitted, and in light of the entire record in this cause, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for New Trial or to Alter or Amend Judgment is DENIED.

2. Plaintiffs' Motion to Alter Judgment and to Amend Judgment is DENIED.

DONE AND ORDERED this 15th day of August, 1984.

/s/ Edward B. Davis
United States District Judge

cc: counsel of record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5738

UNITED STATES OF AMERICA,
Plaintiff-Appellee/
Cross-appellant,

STATE OF FLORIDA, ETC.,
Plaintiff-Intervenor,

versus

M.C.C. OF FLORIDA, INC., *et al.*,
Defendants-Appellants/
Cross-appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 7, 1985, 11 Cir., 1985, —— F.2d ——).

[Filed Nov. 13, 1985]

Before Henderson and Clark, Circuit Judges, and Hoffman*, Senior District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J.Henderson
United States Circuit Judge

* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX D

1. *Rivers and Harbors Act*

§ 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same. (Mar. 3, 1899, ch 425, § 10, 30 Stat. 1151.)

33 USC § 403.

§ 406. *Penalty for wrongful construction of bridges, piers, etc.; removal of structures*

Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [33 USC §§ 401, 403, and 404], or any rule or regulation made by the Secretary of

War [Secretary of the Army] in pursuance of the provisions of said section eleven [33 USC § 404], shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. (Mar. 3, 1899, ch 425, § 12, 30 Stat. 1151; Feb. 20, 1900, ch 23, § 2, 31 Stat. 32.)

33 USC § 406

2. *Clean Water Act*

§ 1311. *Effluent limitations*

(a) *Illegality of pollutant discharges except in compliance with law.* Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. Sec. 1311

* * * *

(b) *Civil actions.* The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under section (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is

doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

33 U.S.C. Sec. 1319(b)

* * * *

(d) *Civil penalties.* Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. Sec. 1319(d)

§ 1344. *Permits for dredged or fill material*

(a) *Discharge into navigable waters at specified disposal sites.* The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. Sec. 1344(a)

3. *Corps of Engineers Regulations*

(k) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(l) The term "discharge of dredged material" means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products.

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure of impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap,

groins, seawalls, breakwaters, and revetments; beach nourishment; levees, fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. § 323.2(k) (l) (m) (n).

4. *Florida Constitution*

F.S.A. Const. Art. 1, Sec. 22.

Sec. 22. *Trial by jury.*

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

5. *Florida Rule of Civil Procedure*

Rule 1.430. *Demand for Jury Trial—Waiver*

The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.

6. *Florida Statutes*

F.S.A. Sec. 403.031(2)

Pollution is the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

F.S.A. Sec. 403.121

The department shall have the following judicial and administrative remedies available to it for violation in a court of competent jurisdiction to

(1) Judicial remedies:

(a) The department may institute a civil action in a court of competent judisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant and aquatic life, of the state caused by any violation; and

(b) The department may institute a civil action in a court of competent jurisdiction to impose and to recover a civil penalty for each violation in an amount of not more than $10,000 per offense. However, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense.

(c) It shall not be a defense to, or ground for dismissal of, these judicial remedies for damages and civil penalties that the department has failed to exhaust its administrative remedies, has failed to serve a notice of violation, or has failed to hold an administrative hearing prior to the institution of a civil action.

(2) Administrative remedies:

(a) The department may institute an administrative proceeding to establish liability and to recover damages for any injury to the air, water, or property, including animal, plant, or aquatic life, of the state caused by any violation. The department may order that the violator pay a specified sum as damages to the state.

Judgment for the amount of damages determined by the department may be entered in any court having jurisdiction thereof and may be enforced as any other judgment.

(b) If the department has reason to believe a violation has occurred; it may institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action.

(c) [Administrative procedure]

(d) Nothing herein shall be construed as preventing any other legal or administrative action in accordance with law.

F.S.A. Sec. 403.131.

* * * *

(2) All the judicial and administrative remedies in this section and Sec. 403.121 are independent and cumulative except that the judicial and administrative remedies to recover damages are alternative and mutually exclusive.

F.S.A. Sec. 403.141. Civil liability; joint and several liability

(1) Whoever commits a violation specified in § 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition, and furthermore is subject to the judicial imposition of a civil penalty for each offense in an amount of not more than $10,000 per offense. How-

ever, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense. Nothing herein shall give the department the right to bring an action on behalf of any private person.

F.S.A. Sec. 403.161(1)

It shall be a violation of this chapter, and it shall be prohibited—

(a) to cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant or aquatic life or property.

(b) to fail to obtain any permit required by this chapter or by rule or regulation, or to violate or fail to comply with any rule, regulation, order, permit or certification adopted or issued by the department pursuant to its lawful authority.

7. *Florida Regulations*

17-3.051 *Minimum Criteria for All Waters at All Times and All Places.* All waters of the State shall at all places and at all times be free from:

(1) Domestic, industrial, agricultural, or other man-induced non-thermal components of discharges which, alone or in combination with other substances or in combination with other components of discharges (whether thermal or non-thermal):

(a) Settle to form putrescene deposits or otherwise create a nuisance; or

(b) Float as debris, scum, oil, or other matter in such amounts as to form nuisances; or

(c) Produce color, odor, taste, turbidity, or other conditions in such degree as to create a nuisance; or

(d) Are acutely toxic; or

(e) Are present in concentrations which are carcinogenic, mutagenic, or teratogenic to human beings or to significant, locally occurring, wildlife or aquatic species; or

(f) Pose a serious danger to the public health, safety, or welfare.

(2) Thermal components of discharges which, alone, or in combination with other discharges or components of discharges (whether thermal or non-thermal):

(a) Produce conditions so as to create a nuisance, or

(b) Do not comply with applicable provisions of Subsection 17-3.05(1), F.A.C.

Rule 17-3.051, Fla. Admin. Code.

17-4.02(12) "Dredging" is the excavation, by any means, in waters of the state. It is also the excavation (or creation) of a water body which is, or is to be, connected to any of the waters listed in Section 17-4.28(2) F.A.C., directly or via an excavated water body or series of excavated water bodies.

Rule 17-4.02(12), Fla. Admin. Code.

17-4.02(15) "Filling" is the deposition, by any means, of materials in waters of the state.

Rule 17-4.02(15), Fla. Admin. Code.

17-4.28 *Dredging or Filling Activities; Permits, Certifications.*

* * * *

(2) Pursuant to Sections 403.061, 403.087, or 403.088, F. S., those dredging or filling activities

which are to be conducted in, or connected directly or via an excavated water body or series of excavated water bodies to, the following categories of waters of the state to their landward extent as defined by Section 17-4.02(17), F.A.C. require permit from the department prior to being undertaken:

* * * *

(e) Atlantic Ocean out to the seaward limit of the State's territorial boundaries;

(f) Gulf of Mexico out to the seaward limit of the State's territorial boundaries;

* * * *

Portion of Section 17-4.28(2), Fla. Admin. Code.

17-4.29(1) Subject to [certain exceptions], the following activities at or below the line of mean high water or ordinary high water in, on or over the navigable waters of the State require a department permit:

* * * *

(b) Dredging and/or digging by pumping sand, rock, silt, or earth of any kind by any means including dredging to connect artificial waterways or waterbodies to navigable waters; and dredging associated with construction and/or installation activities described in this rule.

Portion of Section 17-4.29(1), Fla. Admin. Code.

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1292

In the Supreme Court of the United States

OCTOBER TERM, 1985

M.C.C. OF FLORIDA, INC. AND
MICHAEL CONSTRUCTION CO., PETITIONERS

v.

UNITED STATES OF AMERICA AND FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees a jury trial to an alleged violator of the Clean Water Act and Rivers and Harbors Act in an action brought by the United States seeking injunctive relief, mitigation, restoration of damaged seabed, and civil penalties.

2. Whether petitioners violated the Rivers and Harbors Act and Clean Water Act when their vessels' propellers destroyed sea grass, deposited bottom sediment on adjacent sea grass beds, and dredged channels in the sea bottom.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1292

M.C.C. OF FLORIDA, INC. AND
MICHAEL CONSTRUCTION CO., PETITIONERS

v.

UNITED STATES OF AMERICA AND FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 772 F.2d 1501. The decisions of the district court (Pet. App. 17a-28a, 29a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1985. A petition for rehearing was de-

nied on November 13, 1985 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on January 30, 1986. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, the United States brought an action against petitioners under the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.*, and the Clean Water Act, 33 U.S.C. 1251 *et seq.* The government, seeking injunctive and other equitable relief, alleged that the propellers of petitioners' vessels had, in making contact with the bottom of Niles Channel in southern Florida,[1] vertically cut into the bottom sediments, damaging the fertile grass bed area, causing permanent trenching or scarring, diminishing the water quality due to turbidity, destroying the spawning areas of fish and wildlife, and depositing bottom sediment on adjacent sea grass beds. Petitioners were charged with violating Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, which prohibits, inter alia, the unauthorized "creation of any obstruction * * * to the navigable capacity of any of the waters of the United States," as well as unauthorized excavating or filling which "alter[s] or modif[ies] the course, location, condition, or capacity of * * * the channel of any navigable water of the United States." Petitioners were also charged with violating Section 301 of the Clean Water Act, 33 U.S.C. 1311, which prohibits the discharge of any pollutant into the waters of the United States from any point source.

[1] Niles Channel carries a designation under state law as an "outstanding Florida Water." Such a designation requires special environmental protection for an area. U.S. C.A. Br. 27 n.21.

Dredged spoil, sand, and biological materials are listed in the Act as "pollutants" (33 U.S.C. 1362(6)), and a "point source" includes a "vessel or other floating craft" (33 U.S.C. 1362(14)).[2]

2. a. The district court denied petitioners' request for a jury trial (Pet. App. 14a-16a). After a bench trial, the district court held that petitioners had violated both the Rivers and Harbors Act and the Clean Water Act because the propellers of their vessels had uprooted sea grasses on the bed of Niles Channel and had redeposited the dredged materials on adjacent areas (*id.* at 25a-27a). The court found damage to one of the two sites at issue "dev[a]stating" and, to the second site, "extensive and significant" (*id.* at 24a).

The district court reserved ruling on the issues of restoration of the damaged sites and civil penalties in order to permit the parties an opportunity to study restoration alternatives. The United States submitted two alternate plans for restoring the damaged sites; petitioners submitted none (Pet. App. 4a, 12a, 30a). The district court rejected the government's proposed restoration plans on the basis of cost and insufficient guarantee of success (*id.* at 37a-38a). In lieu of adopting either of the two plans, the district court ordered petitioners to pay the United States $200,000 to be used for restoration of sea grass beds in south Florida under a plan approved by the court and assessed a $20,000 penalty (*id.* at 40a).

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[2] The district court declined to issue a preliminary injunction, but imposed conditions on petitioners' continued use of Niles Channel, requiring, among other things, that petitioners' vessels travel with lighter loads and at high tides (Pet. App. 22a-23a). At trial, the court found that petitioners had failed to comply with these conditions (*id.* at 23a).

b. The court of appeals affirmed (Pet. App. 1a-13a). It carefully analyzed the Rivers and Harbors Act and Clean Water Act (*id.* at 5a-10a), pointed out that the district court had found petitioners' behavior to be " 'illegal and willful' " (*id.* at 7a), and concluded that petitioners had violated both statutes. The court also rejected petitioners' argument that the district court had erred in striking petitioners' demand for a jury trial (*id.* at 10a-11a), finding that the issues under both statutes "were equitable in nature" (*id.* at 11a). While agreeing with the district court's findings that the government's proposed plans were expensive and speculative, the court of appeals reversed the district court's requirement that petitioners pay $200,000 without any specific restoration plan; it remanded so that the district court could order petitioners to submit an alternative plan (*id.* at 12a-13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[3] Accordingly, further review is not warranted.

1. The first question presented in this case is similar to the first question presented in *Tull* v. *United States*, petition for cert. pending, No. 85-1259.[4] In both cases, petitioners have claimed entitlement to a jury trial in actions brought by the United States to enforce the Clean Water Act and Rivers and Harbors Act. Indeed, the court of appeals here (Pet.

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[3] No explicit assertion of a conflict in the courts of appeals is made on either question presented.

[4] Petitioners in each case will be sent both briefs in opposition.

App. 11a-12a n.3) "incorporate[d] the reasoning * * * in *Tull* [769 F.2d 182 (4th Cir. 1985)] as further authority for our conclusion on the jury trial issue." Both decisions are entirely correct, and there are no court of appeals or district court decisions to the contrary.[5]

Petitioners here have a slightly better basis for their claim to a jury trial than does the petitioner in *Tull*. Here, at least, there were disputed questions of fact that might have been submitted to a jury; in *Tull*, we pointed out that "there was no function for the jury to perform" (Br. in Opp. 8). Nonetheless, in neither case was there any legal (rather than equitable) issue and, therefore, there is no Seventh Amendment right implicated in either.[6] See *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446-447 (1830). The court of appeals correctly held (Pet. App. 11a (footnote omitted)) that "[i]t is clear that both the Clean Water Act and River and Harbor Act issues were equitable in nature. Therefore, [petitioners were] not entitled to a jury trial." The mere circum-

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[5] The district courts that have considered the issue have also held that there is no right to a jury trial in a Clean Water Act enforcement action. See, *e.g.*, *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830, 839-840 n.13 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978) (33 U.S.C. 1321); *United States* v. *Lambert*, 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983) (33 U.S.C. 1319).

[6] The lack of any legal (rather than equitable) issue in this case makes it unnecessary to resolve whether there is ever a jury trial right in a civil case with the government. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449-450 n.6 (1977).

stance that there are issues of fact for the court to resolve does not, of course, convert an equitable proceeding into a legal one (or confer a right to a jury trial into a suit in equity).

The right to a jury trial attaches only when "the action involves rights and remedies of the sort traditionally enforced in an action at law" (*Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974)). It is clear that, in designing the complex remedial scheme at issue here, Congress was creating rights and remedies greatly different not only in degree but also in kind from those that existed at common law. Cf. *Thomas* v. *Union Carbide Agricultural Prods. Co.*, No. 84-497 (July 1, 1985), slip op. 13-23; *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981).

Moreover, in *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970), this Court stated:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.

Not only does the action here fail the first test, it fails the two others as well. Neither liability nor remedial issues could have their "jury" and "judge" components teased apart in the civil enforcement actions brought under these statutes. Thus, as discussed below, the liability issues presented were beyond the jury's "practical abilities and limitations" and the remedy sought was an equitable one.

Indeed, the factual issues in this case were entirely mixed with questions of law. The trial here focused largely on the question whether a statutory violation occurred when petitioners' propellers dredged the waterbed and redeposited the bottom

material on adjacent sea grass beds. Similarly, in *Tull* it was on whether the areas filled were "wetlands." These were "primarily [questions] of regulatory and statutory interpretation" (*United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4), and were thus for a court, not a jury, to decide.

The remedies in these cases, moreover, are solely equitable. As this Court held in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 316 (1982), a district court in a Clean Water Act proceeding is called upon to exercise its "traditional equitable discretion in enforcing the statute." Such discretion should result in an order "that will achieve *compliance* with the Act" (*id.* at 318 (emphasis in original)). The equitable nature of the remedies is especially apparent in 33 U.S.C. 1319 and 406, the provisions, respectively, of the Clean Water Act and the Rivers and Harbors Act which were involved here. As we have explained in more detail in our response in *Tull* (at 7-8), the civil penalties, no less than the other relief provided, were equitable in nature.

Moreover, the civil penalty in this case was part of an overall remedial plan which included mitigation and restoration.[7] Specifically, the district court ordered petitioners to pay $200,000 to be used "for restoration of seagrass beds in south Florida under a plan to be approved by the Court" (Pet. App. 40a) and the court of appeals remanded "for the purpose of * * * requiring [petitioners] to prepare and submit a substitute environmental plan together with estimated costs" (*id.* at 13a). As the court of ap-

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[7] The government sought injunctive relief as well (Pet. App. 3a).

peals in *Tull* explained (769 F.2d at 187 (footnote omitted)):

> [T]he assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence.

Petitioners do not appear to argue—and surely they would not—that a jury would formulate any part of the package except civil penalties. But the package's coherence would be lost if one part were formulated by the jury and the rest by the court. In sum, the remedies sought and guaranteed in this case in particular, and under the Clean Water Act and Rivers and Harbors Act generally, are equitable.

2. Petitioners also urge review by this Court of the findings by two lower courts that they had violated both the Rivers and Harbors Act and the Clean Water Act. Since violation of either Act independently supports the remedy awarded, petitioners have the burden of showing that both statutes have been misapplied. They assert that their vessels were simply "navigating" (Pet. 17) and that Congress never intended either of the two statutes to preclude the activities found illegal. Neither assertion is correct.

a. Petitioners characterize the effect of the decision in this case as empowering the Corps of Engineers "to prevent petitioners from navigating" (Pet. 17) and "to halt shipping * * * wherever navigation results in bottom roiling or bottom contact" (*id.* at 19). But petitioners' vessels were found to have done a great deal more than merely navigating or making

incidental contact with the bottom of Niles Channel. The district court found that the propellers of petitioners' vessels had been observed uprooting and destroying sea grass and depositing the bottom sediment on adjacent sea grass beds (Pet. App. 23a) and had also, "on at least three occasions, caused turbidity over an extensive area well in excess of fifty Jackson Units above the natural functioning of the marine eco-system" (*ibid.*). Petitioners' vessels were found to have been largely responsible for a propeller-dredged channel approximately 2,000 feet long and ranging from 50 to 200 feet wide (*id.* at 30a). Petitioners' violations of the pollution and environmental laws were found to be willful (*id.* at 38a). All this goes beyond simply "navigating."

b. Petitioners are correct in stating that Congress enacted the Rivers and Harbors Act to enhance navigation (Pet. 18). Petitioners also urge the Court, however, to adopt an interpretation of Section 10 which, in light of their "devastating" and destructive actions, would be a "narrow, cramped reading" of the statute (*United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491 (1960)) and would fail to draw a distinction between de minimis and flagrant violations. The court of appeals correctly rejected this narrow reading of Section 10 in finding that the first clause of Section 10 had been violated, and went on to find that, in any event, petitioners had violated the third clause of Section 10 as well (Pet. App. 7a):

> Repeatedly going back and forth across the subject areas with equipment that is dredging a channel and dumping the spoil on the adjacent sea grass beds clearly fits within the plain language of the third clause of Section 10. The fact

> that the equipment used was the propellers of a tug is immaterial. [Petitioners] knew that [their] activities were dredging a channel and filling the adjacent areas.

This factbound finding is correct and does not merit further review.

In also urging the inapplicability of the Clean Water Act, petitioners assert that the "mere use of the bed of navigable waters" (Pet. 19) is not an unlawful discharge of a pollutant or the addition of dredged material into waters of the United States. But, once again, petitioners' activities were hardly of the de minimis sort they assert them to be. Moreover, petitioners' discussion of the Clean Water Act disregards the fact that the 1972 amendments to the Act represented "a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' " (*Riverside Bayview Homes, Inc.*, slip op. 10 (quoting 33 U.S.C. 1251)). Thus, in asserting that its vessels added nothing to the waters of Niles Channel (Pet. 19), petitioners ignore the fact that, as noted by the court of appeals, the word "addition" as used in defining "discharge" " 'may reasonably be understood to include "redeposit" ' " (Pet. App. 10a, quoting *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)). That redeposit "clearly disturb[ed] the 'physical and biological integrity' of the subject areas" (Pet. App. 10a (quoting 33 U.S.C. 1251)), in contravention of Congress's mandate. Petitioners cite no authority to the contrary.

Petitioners conclude by asserting that "[t]he holdings below grant to the Corps of Engineers a vast expansion of its power and jurisdiction, which may

be arbitrarily exercised about the country" (Pet. 20). This Court has, however, recently acknowledged "the breadth of federal regulatory authority contemplated by the [Clean Water] Act itself" (*Riverside Bayview Homes, Inc.*, slip. op. 12) and that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress" (*id.* at 9). Moreover, petitioners' claim that the government has shown a propensity to abuse its regulatory authority in this case is far-fetched. Both the district court and the court of appeals found, as a factual matter, that petitioners' vessels had repeatedly gone back and forth through Niles Channel, dredging a channel and filling adjacent areas. This finding is not seriously disputed, and this Court has, of course, repeatedly expressed its reluctance to review factual findings concurred in by two lower courts. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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M.C.C. OF FLORIDA, INC.

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STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL REGULATION,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. In its brief in opposition, the United States concedes that this case involves "disputed questions of fact that might have been submitted to a jury." Br. in Opp. 5. The Government suggests, however, that a jury trial was not necessary because these questions "were entirely mixed with questions of law," with the trial focused "largely" on whether petitioners' conduct violated the statute. Br. in Opp. 6-7.

Contrary to the Government's suggestion, the factual issues disputed at trial went far beyond questions of regulatory and statutory interpretation. The issues included the amount of navigation previously occurring in

the channel, the amount of pre-existing damage to the channel, the permanence of the bottom disturbance, the credibility of witnesses, and a host of other purely factual questions. Pet. 10. Indeed, the Government itself stresses the factual nature of the issues decided at trial in arguing, in the second section of its brief in opposition, that this Court should not review those factual findings. Br. in Opp. 11. The Government cannot contend that the factual issues primarily involve regulatory and statutory interpretation when arguing against the right to a jury trial, and then turn around and assert that the same issues are purely factual matters when arguing against review of those issues by this Court.

The Government also notes that the statutory schemes at issue are "complex" and suggests that the liability issues "were beyond the jury's 'practical abilities and limitations.' " Br. in Opp. 6. Mere complexity, however, does not suffice to defeat the right to a jury trial. *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980). In addition, the factual questions in dispute concerned the conduct of defendants and the extent to which that conduct caused the damage. "These issues are the very sort which juries are traditionally called on to resolve." *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 429 (2d Cir. 1974). Finally, Congress could have provided for these factual issues to be resolved by an expert agency, subject only to appellate review, if it considered the issues too complex. In such a case there would be no right to a jury trial. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). Congress did not do so, but instead invoked the jurisdiction of the District Courts to enforce these statutes and punish transgressions. In such a case, "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts," the right to a jury trial attaches. *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974).

The Government argues that the factual issues concededly involved in this case should not go to a jury because the remedy is equitable in nature. The lower courts have not found the issue to be so clear. As one court has noted, "it is not immediately clear whether a civil penalty can be characterized as a legal or equitable remedy." *Mosley* v. *National Finance Co., Inc.*, 440 F. Supp. 621, 622 (M.D.N.C. 1977). Judge Friendly, writing for the court in *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 423 (2d Cir. 1974), cited numerous cases to support the conclusion that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the discretion of the court * * *."

Despite the Government's assertion of the absence of a conflict in the Courts of Appeals, there is a clear and irreconcilable tension between the decisions of the court below and in *United States* v. *Tull*, 769 F.2d 182 (4th Cir. 1985), petition for cert. pending, No. 85-1259, on the one hand, and *J.B. Williams Co.* and the cases cited therein, on the other hand. The cases involve different statutes but the same basic question of the right to a jury trial in a civil penalty case. As evidenced by the lengthy list in the appendix to the petition in *Tull*, there are scores of recently enacted statutes that provide for the imposition of what can amount to staggering civil penalties. This Court should resolve the confusion in the lower courts over whether facts can be found and sizable penalties imposed for violation of these statutes without the protection of a jury trial guaranteed by the Seventh Amendment.

2. The Government urges this Court not to review the decision of the court below that petitioners violated the Rivers and Harbors Act and the Clean Water Act, contending that these conclusions are "factbound." Br. in Opp. 10-11. This is not, however, a case in which

clear and accepted statutory guidelines were applied to the facts. On the contrary, with respect to both Acts, the court below was compelled to stretch and strain the statutory language to cover petitioners' conduct.

The Rivers and Harbors Act, intended to enhance navigation, prohibits obstruction of navigable waters. 33 U.S.C. § 403. It is difficult to discern how the very conduct of navigation—petitioners' action in this case, and what the statute was intended to promote—can be considered an obstruction of navigation. The Act also makes it unlawful "to excavate or fill" any channel unless "the work" has been approved by the Chief of Engineers. 33 U.S.C. § 403. At most this case involves incidental consequences of navigation, not intentional "work" undertaken for the purposes forbidden by the statute. As noted by amicus curiae American Institute of Merchant Shipping, the court's strained reading not only will not promote the goal of the statute—enhanced navigation—but will have the exact opposite effect of "impos[ing] severe burdens on maritime traffic." Br. of Amicus Curiae American Institute of Merchant Shipping in Support of Pet. 7.

The Clean Water Act prohibits the "discharge of a pollutant" into the navigable waters of the United States and defines "discharge of a pollutant" to include "any addition of any pollutant" to the navigable waters. 33 U.S.C. § 1311(a), 1362(12). Neither the court below nor the Government can contend that petitioners' vessel "discharged" anything into the waters as the word "discharge" is normally understood, nor that it "added" anything to the waters that was not already there. The Government argues that "addition" should be read as including "redeposit," citing *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). That case, however, involved extensive and deliberate land-clearing activities, not incidental consequences of navigation. In addition, in *Avoyelles*, material was cut and

deliberately redeposited in specific locations as fill; here there was no such purposeful activity.

The Government makes much of statements by this Court that an agency's construction of a statute it is charged with enforcing is entitled to deference. This proposition, however, "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction * * *." *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Here the agency considers the conduct of navigation to be an obstruction to navigation, views navigation as dredging "work," and finds a "discharge" and an "addition" when nothing was emitted from petitioners' vessel or added to the waters. No deference is entitled to such strained readings adopted by an agency to extend its own jurisdiction.

For the foregoing reasons, and the reasons in the Petition, the Petition should be granted.

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF MERCHANT SHIPPING IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1292

M.C.C. OF FLORIDA, INC.

and

MICHAEL CONSTRUCTION COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA

and

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF MERCHANT SHIPPING IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae American Institute of Merchant Shipping represents 22 owners and operators of some 250 American flag vessels engaged in international commerce. The Institute and its members have a vital interest in the fair and just administration of the mari-

time law of the United States. Both of the rulings of the Court of Appeals in this case have enormous adverse implications for vessels everywhere: the ruling that the inadvertent roiling of channel bottoms constitutes a violation of the Clean Water Act and the Rivers and Harbors Act imposes severe restrictions on the scope of maritime activity, and the ruling that vessel owners sued by the Government for penalties are not entitled to a jury trial denies vessel owners an important constitutional protection. Amicus believes that these rulings are wrong, that they are of national significance, and that the Court should grant certiorari and reverse them.

ARGUMENT

I. THE RIGHT TO JURY TRIAL MUST BE PRESERVED IN ACTIONS FOR STATUTORY CIVIL PENALTIES

The denial of petitioner M.C.C.'s right to jury trial in this case sets a precedent inconsistent with both prior case law in other Circuits and this Court's many rulings on the right to jury trial. By relying on the purported equitable nature of the Clean Water and Rivers and Harbors Acts, the Court of Appeals' decision presents a direct threat to the jury trial rights of many owners and operators of maritime vessels.

This issue is of particular concern to amicus in light of the more than sixty federal civil penalty provisions potentially applicable to maritime activity. These provisions include penalties of up to $100,000 per violation for unlawful importation of protected tuna species, 16 U.S.C. § 972f (Supp. II 1984), penalties of up to $25,000 per violation for use of discriminatory rates or practices, 46 U.S.C. § 815 (1982), and penalties of up to $50,000 per shipment for violation of controls over rates and conditions of transportation. 46 U.S.C.A. § 1712 (West Supp.

1985).[1] This Court has repeatedly emphasized the importance of the right to jury trial and should reaffirm that principle in this case.

At issue here were complaints by the United States Government for injunctive relief and civil penalties for violations of the Clean Water Act and Rivers and Harbors Act, 33 U.S.C. §§ 403, 1311 & 1344 (1982), and by the intervenor Florida Department of Environmental Regulation (DER) for injunctive relief, civil penalties, and general damages under Florida law.[2] The events at issue relate to a cease and desist order served on petitioners when they began transporting barges to a federal aid bridge construction work site. Upon consideration of a welter of contradictory factual evidence, the District Court awarded $200,000 in damages and $20,000 in civil penalties for state and federal violations.

Previous courts, including this one, have concluded that such claims for civil monetary recovery present legal claims subject to the Seventh Amendment's guarantee of the right to trial by jury. First, there can be no question that a claim for monetary damages is a legal claim. *Curtis* v. *Loether*, 415 U.S. 189 (1974). Second, this Court has concluded, *Hepner* v. *United States*, 213 U.S. 103, 115 (1909); *United States* v. *Regan*, 232 U.S. 37, 47 (1914), and the Second Circuit has held, *United*

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[1] In the Appendix to the petition for certiorari filed with this Court in the case of *United States* v. *Tull*, 769 F.2d 182 (4th Cir. 1985) (No. 85-1259), the Court will find a listing of the vast array of penalty provisions in which factual determinations are initially made in a court proceeding, rather than by an administrative tribunal. *See Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (Congress may assign the fact-finding function and initial adjudication to an administrative forum without violating the Seventh Amendment).

[2] Florida law imposes liability to the State for any damage caused by violation of certain environmental provisions. Fla. Stat. Ann. § 403.141 (West Supp. 1985).

States v. *J. B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974), that actions for statutory civil penalties are covered by the Seventh Amendment guarantee.

The Eleventh Circuit's rejection of the reasoning of this Court and the holding of the Second Circuit represents an unwarranted departure from settled doctrine.[3] In particular, the Court of Appeals' misguided Seventh Amendment analysis, if left undisturbed, poses a severe threat to the right to jury trial under the penalty provisions of the Rivers and Harbors Act and the Clean Water Act. The court correctly noted that when a case presents both legal and equitable issues, "the right to jury trial as to the legal issues remains." *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985). *See Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). It then disregarded that rule and based its decision on two cases applying the Rivers and Harbors Act and Clean Water Act which had relied upon equitable principles. 772 F.2d at 1507. It concluded that, since equitable principles had been applied to these Acts, the issues in the case before it "were equitable in nature." *Id.*

Neither of the cases upon which the Court of Appeals relied supports a finding that the present action for civil penalties and damages is "equitable." In *Wyandotte Co.* v. *United States*, 389 U.S. 191 (1967), the Court implied a remedy not expressly available under the Rivers and Harbors Act. The application of equitable doctrines to devise such an additional remedy has no bearing on whether monetary remedies expressly stated in the statute are legal or equitable. In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the issue was the scope of a court's equitable discretion under the Clean Water Act.

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[3] The Fourth Circuit has followed the same path as the Eleventh in *United States* v. *Tull*, *supra*, review of which is also being sought in this Court (No. 85-1259).

The Court of Appeals had held that the Act imposed an absolute statutory obligation to enjoin illegal discharges; this Court reversed that decision and held that the federal courts could exercise their equitable discretion to determine the best course by which to achieve compliance with the Act. 456 U.S. at 318-319. Neither case involved an action for civil penalties, and neither addressed the issues presented in this case.

The Eleventh Circuit's broad-brush approach sweeps far beyond the facts of this case to threaten the right to jury trial in any action which arises under the Rivers and Harbors Act, the Clean Water Act, or any other federal statute to which equitable principles have ever been applied and in which factual determinations are initially made in a court proceeding, rather than by an administrative tribunal.[4] The Court's decision on the jury trial issue merits summary reversal by this Court.

II. THE NORMAL USE OF A WATERWAY FOR NAVIGATION DOES NOT OBSTRUCT THE WATERWAY OR CONSTITUTE A DISCHARGE OF POLLUTANTS

The second ruling by the Court of Appeals has implications even more wide-reaching for the maritime industry. The court held that the normal operation of a tugboat, which by its use of propellers necessarily stirs up the water in which it operates, can constitute unlawful dredging and discharging of pollutants into a waterway. 772 F.2d at 1504-06. Such a major change in the law has serious implications for all vessels which at any time operate in shallow water, and it cannot be reconciled with the intended purpose and scope of the Rivers and Harbors Act or the Clean Water Act.

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[4] *See Atlas Roofing Co., supra* note 1.

A. The Court of Appeals' Decision Offers a Dramatically New Interpretation of the Rivers and Harbors Act

The Court of Appeals' unprecedented holding that the normal operation of a tugboat can violate Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, will have wide-ranging results directly contrary to that Act's primary purpose: the promotion of navigation. Under the court's decision, the threat of substantial federal penalties will force large numbers of vessel operators to engage in the expensive and time-consuming process of seeking a dredging permit before they may leave the dock. Congress never intended such a result in the Rivers and Harbors Act.

The goal of the Act was to ensure that navigable waters would remain unobstructed and free for navigation. *E.g.*, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-709 (1899); *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1297 (5th Cir. 1976); *Potomac River Ass'n, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 351-358 (D. Md. 1975). In connection with that goal, the Act rendered it unlawful to "excavate or fill, or *in any manner to alter or modify* the course, location, condition, or capacity of, any * * * channel of any navigable water" unless the "work" is approved by the Secretary of the Army. 33 U.S.C. § 403 (emphasis added). *See* 33 C.F.R. § 322.3(a) (1984) (permit requirement).

By its terms, this statute bars the slightest alteration of any aspect of a navigable waterway; it cannot reasonably be taken at face value. Instead, the scope of its prohibition must be interpreted with the Act's goals in mind. The provision refers to "navigable water," and the definition of navigability presumes the existence of vessels plying the waters. *See* 33 C.F.R. § 329.4 (1984) (navigable waters are those useful "to transport interstate or foreign commerce"). The disturbance of the

water necessarily associated with such maritime traffic could not have been within the intended scope of the statutory words "excavate" or "alter or modify." [5]

The decision of the Court of Appeals does not merely ignore the Act's goals; it directly defeats them. Instead of interpreting Section 403 in a manner that fulfills the Act's purpose of promoting and protecting navigation, the court has chosen to impose severe burdens on maritime traffic. Its decision in this case requires every person who wishes to operate a vessel in shallow or tidal waters to seek a permit—which may or may not be granted—or operate in violation of the law and incur substantial penalties.

This Court should make clear that the Rivers and Harbors Act cannot be interpreted in such a way as to defeat its very reason for being. The Court should reverse the Court of Appeals' holding that the normal operation of a vessel in navigable waters can constitute unpermitted excavation or alteration of a navigable channel under the Act.

B. The Court of Appeals' Decision Distorts the Meaning of the Clean Water Act

This case is about a tugboat which disturbed the grass and sandy bottom of a waterway. The Court of Appeals' decision turns it into a case of a "point source" which "discharged pollutants" into the water. *See* 772 F.2d at 1505-06. By such a definition, wading in a creek without a permit becomes a violation of the Clean Water Act. Such a strained interpretation cannot be allowed to stand.

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[5] The Corps of Engineers has adopted regulations governing "dredging," and has indicated that its regulations are based in part on Section 403. *See* 33 C.F.R. § 322.2(c) (1984) (defining the term "work" in Section 403 to include "dredging" or "other modification" of a "navigable water"). The term "dredged material" is defined to mean material "excavated or dredged." 33 C.F.R. § 323.2(i) (1984).

The court noted that the sea grass, sand and mud distributed by M.C.C.'s craft was moved through the water and "redeposited" on adjacent sea grass. 772 F.2d at 1506. This slight movement of material already in the water was deemed sufficient to render it "dredged spoil" that was "discharged" by M.C.C.[6]

The Act defines the "discharge" of a pollutant as the "*addition* of any pollutant to navigable waters from any point source * * *." 33 U.S.C. § 1362(12) (1982) (emphasis added). The Court of Appeals interpreted the plain language of this provision—the word "addition"—to include "redeposit." 772 F.2d at 1506. It relied upon two authorities: the expressed concern in the legislative history of the Clean Water Act for the "biological integrity of the Nation's waters," 772 F.2d at 1506 (quoting 33 U.S.C. § 1251 (1982)), and the case of *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). 772 F.2d at 1506.

The Clean Water Act was not designed to prohibit all uses of the waters; it was intended—as the court's own selection from the legislative history demonstrates—to prevent man-made changes that "overtax[] the ability of nature to restore conditions to 'natural' or 'original' * * *." 772 F.2d at 1506 (quoting H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76-77 (1972)). Although the court found some damage to the stream bottom, 772 F.2d at 1503-04, amicus submits that the effect of normal boat traffic on a waterway designated as navigable does not, as a matter of law, rise to the level of "overtaxing" nature beyond its capacity to recover.

Similarly, the case upon which the court relied presented a situation entirely different from this one. In

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[6] *See* 33 U.S.C. §§ 1311 (outlawing the "discharge of any pollutant"); 1362(6) (defining "pollutant" to include "dredged spoil," "biological materials" and "rock sand") & 1362(14) (defining "point source" to include a "vessel") (1982).

Avoyelles, the defendants bulldozed, burned and levelled 20,000 acres of wetland in order to transform it into a field suitable for growing soybeans. The Fifth Circuit concluded that the defendants' activities "would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract." *Avoyelles*, 715 F.2d at 923. It therefore concluded that, in order to serve the purposes of the Act, the defendants' "redepositing" of materials taken from the wetlands constituted a discharge. *Id.* at 923-924.

In the present case, there was no activity that changed the use of the stream or that was shown irreversibly to affect its integrity. M.C.C.'s vessel was simply using a navigable stream for the purpose of navigation. It distorts the Clean Water Act to extend its prohibitions to such activity.[7]

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[7] The inconsistency of this decision with the Act's permit structure provides further evidence that no permit requirement was contemplated. Under the permit procedures of 33 U.S.C. § 1344 (1982), a vessel operator may be issued a permit to discharge dredged material only after "notice and opportunity for public hearings" addressing the applicant's "specified disposal sites." 33 U.S.C. § 1344(a) (1982). Under certain circumstances, an applicant may seek a general permit without the need to specify a site, but notice and hearing procedures must still be followed. *Id.* § 1344(e). *See also* 40 C.F.R. Part 230 (1985) (detailed guidelines for permit applications). Since the precise site, timing, and nature of a vessel's purported "dredging" are to a large extent unforeseeable to the applicant, it is difficult to envision how the standard permit application procedures could be followed.

CONCLUSION

The Court of Appeals' decision in this case disregards established principles governing the right to jury trial and distorts the meaning of the Rivers and Harbors Act and Clean Water Act. By virtue of this decision the simple operation of a tugboat in navigable waters becomes a violation of numerous federal laws and regulations, imposing the need for extensive permit applications. In light of the severe burden imposed on the maritime industry by this decision, it is imperative that this Court grant certiorari and reverse the Eleventh Circuit's decision.

Respectfully submitted,

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